(6)

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. 01-7662

IN THE

Supreme Court of the United States

THOMAS JOE MILLER-EL,
Petitioner,

v.

JANIE COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

JOINT APPENDIX VOLUME I OF II

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PETITION FOR CERTIORARI FILED DECEMBER 11, 2001
CERTIORARI GRANTED FEBRUARY 15, 2002

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A. Direct Appeal—CCA #69,677, Dist Ct. #F85—78668

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1	CCA	1st Motion for Extension of Time in Which to File Appellant's Brief	12/19/86
2	CCA	Order extending time to 2/2/87	12/23/86
3	CCA	2nd Motion for Extension of Time in Which to File Appellant's Brief	2/2/87
4	CCA	Order extending time to 3/15/87	2/3/87
5	CCA	Motion requesting extension	
6	CCA	order extending time to 4/15/87	3/11/87
7	CCA	Motion for Extension of Time in Which to File Brief	4/15/87
8	CCA	Order extending time to 4/27/87	4/15/87
9	CCA	Brief for the Appellant	4/27/87
10	CCA	Motion to Extend Page Limitation of Brief	4/27/87
11	CCA	1st State's Motion to Extend the Time for Filing the State's Brief	5/19/87
12	CCA	Order extending time to 7/26/87	5/19/87
13	CCA	State's Motion to Extend the Time for Filing the State's Brief	7/27/87
14	CCA	Order extending time to 8/31/87	7/27/87
15	CCA	State's Motion to Extend the Time for Filing the State's Brief	8/31/87
16	CCA	Order extending time to 10/15/87	9/1/87
17	CCA	State's Motion to Extend the Time for Filing the State's Brief	10/15/87
18	CCA	Order extending time to 10/25/87	10/15/87
19	CCA	Cover Letter for State's Brief (Not attached	10/23/87
20	CCA	Letter noting receipt of Court's order extending time to 1/27/88 and Order extending time	11/4/87
21	CCA	Letter, defense attorney, requesting oral argument	11/25/87
22	CCA	opinion, abating appeal	3/3/88

No.	Court	Document	Date
23	CCA	State's Motion for Rehearing (Seeking Modification of the Court's Order of Remand's Delivered March 3, 1988)	3/17/88
24	CCA	State's Motion for Leave to File MRH denied; abated to TC	4/27/88
25	CCA Notice	Supplemental Statement of Facts was received and filed	7/5/89
26	CCA	opinion, Affirmed	9/16/92
27	CCA	Motion to Extend the Time for the Filing of a Motion for Rehearing	10/8/92
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30	CCA	Order extending time to 11/30/92	11/3/92
31	CCA	Motion for Leave to File and Motion for Rehearing	11/30/92
32	CCA	Order extending time to 12/8/92	12/8/92
33	CCA	Mandate	2/5/93
34	CCA	Shuck Cover	
35	Crim. Dist. Ct. No. 5, Dallas Cty	Order Modifying Execution Date	2/7/94
36	Crim. Dist. Ct. No. 5, Dallas County	Order Modifying Execution Date and Appointing counsel	7/18/94
37	CCA	Order Modifying Execution Date	9/20/94
38	Crim. Dist. Ct. No. 5, Dallas Ctt t	Order Setting Execution Date	10/5/2001

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS (DALLAS)

[FILED 07/16/96]

CIVIL DOCKET FOR CASE H: 96—CV—1992

THOMAS JOE MILLER—EL,
Petitioner,
v.
JANIE COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION,
Respondent.

DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
7/16/96	1	APPLICATION by plaintiff Thomas Joe Miller—E1 for Stay of Execution (15+). 0 (amy) [Entry date 07/17/96]
7/16/96	1	MOTION by plaintiff Thomas Joe Miller—E1 for appointment of counsel (15+), (amy) [Entry date 07/17/96]
7/16/96	2	MOTION by plaintiff Thomas Joe Miller—E1 to proceed in forma pauperis (3), (amy) [Entry date 47/17/96]
7/16/96	3	Statement of Willingness to Accept Ap—pointment by movant Mandy Welch, movant Gregory W Wiercioch, movant James Marcus (5). (amy) [Entry date 07/17/96]

DATE	NO.	PROCEEDINGS
7/16/96	—	PRELIMINARY ASSIGNMENT TO Magistrate Judge Jeff Kaplan (amy) [Entry date 01/17/96]
7/17/96	4	ORDER granting [1-1] application for stay of execution. The execution date of 7/30/96 is hereby stayed; Mandy Welch director of the Texas Defender service is appointed for Mr. Miller-E1 ; a Texas Defender Service Staff Attorney, designated by Me Welch will enter an appearance as attorney-in-charge within 10 days of the date of this order; appointed counsel is granted 120 days from the date of this order within which to file a petition for writ of habeas corpus on behalf of the plaintiff (signed by HBS) copies to counsel; 7/17/96 FAXED Page(s) 2 (amy)
7/17/96	5	ORDER granting [2-1] motion to proceed in forma pauperis (signed by H85) Copies to counsel: 7/17/96 FAXED Page(s) 1 (amy)
7/23/96	6	MOTION by Thomas Joe Miller-El for Jim Marcus to appear pro hac vice (4) (bjj) [Entry date 07/24/96]
7/23/96	7	ORDER granting [6-1] motion for aim Marcus to appear pro hac vice (signed by Judge Sanders) Copies to counsel: 7/24/96 Page(s) 1 (bjj) [Entry date 07/24/96]
7/23/96	8	MOTION by defendant Director TDCJ for reconsideration of [4-2] order granting petitioner 120 days in which to file his Federal Habeas Petition (15+) (lch) [Entry date 07/24/96]

DATE	NO.	PROCEEDINGS
7/23/96	9	NOTICE of attorney appearance for plaintiff Thomas Joe Miller-E1 by Gregory William Wiercioch, Jim Marcus (2) (lch) [Entry date 07/24/96]
7/24/96	10	NOTICE of Intent to Respond by plaintiff Thomas Joe Miller-E1 (2) (tsp) [Entry date 07/25/96]
7/24/96	11	ORDER Response to motion reset to 8/6/96 for (8-1) motion for reconsideration of [4-2] order granting petitioner 120 days in which to file his federal Habeas Petition (signed by Judge Sanders) Copies to counsel: 7/25/96 Page (s) 1 (lmn) [Entry date 07/25/96]
6/6/96	12	RESPONSE by plaintiff Thomas Joe Miller-El to [8-1] motion for reconsideration of [4-2] order granting petitioner 120 days in which to file his Federal Habeas Petition (15+) (wcc) [Entry date 08/07/96]
8/12/96	13	ORDER granting [8-1] motion for reconsideration of [4-2] order granting petitioner 120 days in which to file his Federal Habeas Petition the petition will be due 10/21/96 (signed by HBS) Copies to counsel: 08/13/96 Page(s) 1 (wcc) [Entry date 08/13/96]
9/20/96	14	EX PARTE SEALED MOTION (svc)
9/26/96	15	SEALED DOCUMENT placed in sealed area (wcc) [Entry date 09/27/96]
10/9/96	17	MOTION by plaintiff Thomas Joe Miller-E1 to extend time to file petition for writ of HC (6) (wcc) [Entry date 10/15/96]

DATE	NO.	PROCEEDINGS
10/10/96	16	ORDER . . . granting petr's mot for ext of time to file petition for writ of HC Granted (signed by hbs) Copies to counsel: 10.10.96 Page(s) 1 (wcc)
11/1/96	18	SEALED EX PARTE DOCUMENT placed in sealed area (klm)
11/1/96	19	MOTION by plaintiff Thomas Joe Miller-E1 to extend time to file Petition for Writ of Habeas Corpus (15+) (klm)
11/1/96	21	ORDER . . . petition for writ of HC must be filed by noon 12/13/96 (signed by HBS) Copies to counsel: 11.06.96 Page(s) 1 (wcc) [Entry date 11/06/96]
11/5196	20	Request by plaintiff Thomas Joe Miller-El for Court to take judicial notice of Fifth Circuit opinion (15+) (wcc) [Entry date 11/06/96]
11/5/96	22	ORDER Response to motion reset to 12:00 11/19/96 for (19-11 motion to extend time to file Petition for Writ of Habeas Corpus (signed by HBS) Copies to counsel: 11.06.96 Page(s) 1 (wcc) [Entry date 11/06/96]
11/14/96	23	RESPONSE by defendant Director TDCJ in opposition to (19-11 motion to extend time to file Petition for Writ of Habeas Corpus (10) (k1m)

DATE	NO.	PROCEEDINGS
11/15/96	24	MOTION by plaintiff Thomas Joe Miller-El for leave to file Reply to respondent Johnson's opposition to petitioner's motion for extension of time to file federal Habeas Petition 3) (wcc)
11/20/96	25	ORDER denying [19-1] motion to extend timeto file Petition for Writ of Habeas Corpus (signed by HBS) copies to counsel: 11.20.96 Page(s) 1 {wcc)
11/25/96	26	SEALED DOCUMENT placed in sealed area (wcc) [Entry date 11/26/96]
12/12/96	27	SEALED DOCUMENT placed in sealed area (ldm) [Entry date 05/06/97]
3/4/97	28	MOTION by plaintiff Thomas Joe Miller-E1 for leave to file Petition for Writ of He within statutory one year deadline (15+) (wcc) [Entry date 03/05/97]
3/5/97	29	ORDER Response to motion reset to 12:00 3/14/97 for (28-11 motion for leave to file petition for Writ of HC within statutory one year deadline (signed by HBS) Copies to counsel: 03.05.97 Page(s) 1 (wcc)
3/10197	30	ORDER . . . vacating order of 11/1/96 pending a ruling on motion for extension of statutory one year deadline HC (signed by HBS) Copies to counsel: 03.10.97 Page(s) 1 (wcc)
3/10/97	31	RESPONSE by defendant Director TDCJ in opposition to (28-1) motion for leave to file Petition for Writ of HC within statutory one year deadline (5) (wcc)

DATE	NO.	PROCEEDINGS
3/11/97	32	MOTION by plaintiff Thomas Joe Miller-El for leave to file reply to respondent's opposition to petitioner's motion for leave to file petition for writ of HC within statutory one-year filing deadline (10) (wcc) [Entry date 03/12/97]
3/13/97	33	ORDER granting [32-1] motion for leave to file reply to respondent's opposition to petitioner's motion for leave to file petition for writ of HC within statutory one-year filing deadline (signed by HBS) Copies to counsel: 03.14.97 Page(s) 1 (wcc) [Entry date 03/14/97]
3/13/97	34	RESPONSE by plaintiff Thomas Joe Miller-El in opposition to [31-1] opposition response (7) (wcc) [Entry date 03/14/97]
3/14/97	35	ORDER granting [28-1] motion for leave to file petition for Writ of HC within statutory one year deadline; due 06.17.97 (signed by HBS) copies to counsel: 03.14.97 Page(s) 1 (wcc)
4/10/97	36	SEALED DOCUMENT placed in sealed area (ldm) [Entry date 05/08/97]
4/11/97	37	MOTION by plaintiff Thomas Joe Miller-El for leave to file Petition for writ of HC before 04.24.97 with leave to file amended original petition by 06.17.97 (8) (wcc)

DATE	NO.	PROCEEDINGS
4/11/91	38	ORDER Response to motion reset to 12:00 4/18/97 for (31-13 motion far leave to file Petition for Writ of He before 04.24.97 with leave to file amended original petition by 06.17.97 (signed by HBS) Copies to counsel: 04.14.97 Page(s) 1 (wcc) [Entry date 04/14/97]
4/15/97	39	SEALED DOCUMENT placed in sealed area (wcc) [Entry date 04/18/97]
4/18/97	40	RESPONSE by defendant Director TDCJ in opposition to [37-1] motion for leave to file Petition for Writ of HC before 04.24.97 with leave to file amended original petition by 06.17.97 (11) (wcc) [Entry date 04/21/91]
4/21/97	41	SEALED DOCUMENT placed in sealed area (wcc)
4/22/97	42	MOTION by plaintiff Thomas Joe Miller-El for leave to file reply to respondent Johnson's opposition to petitioner's motion for an order allowing petitioner to file a petition for writ of HC before 04/24/97 with leave to file amended original petition by 06/17/97 (wcc) [Edit date 05/15/97]
4/24/97	43	MOTION by defendant Director TDCJ to strike petitioner's ex parte sealed motions for investigative funds (6) (wcc)
4/28/97	44	ORDER OF USCA (certified copy) Re: The petition for writ of mandamus is DENIED, (2) cc to judge. (st) [Entry date 04/29/7]

DATE	NO.	PROCEEDINGS
9/30/97	45	RESPONSE by plaintiff Thomas Joe Miller-El to [43-1] motion to strike petitioner's ex parte sealed motions for investigative funds (15+) (wcc)
5/1/97	46	REPLY by defendant Director TDCJ to response to [43-1] motion to strike petitioner's ex parte sealed motions for investtigative funds (14) (wcc)
5/6/97	47	SEALED DOCUMENT placed in sealed area (wcc) [Entry date 05/07/97]
5/7/97	48	SEALED DOCUMENT placed in sealed area (wcc)
5/16/97	49	SUPPLEMENTAL REPLY by defendant Director TDCJ to response to [43-1] motion to strike petitioner's ex parte sealed motions for investigative funds (15) (wcc)
6/17/97	50	MEMORANDUM OPINION AND ORDER re: compensation of counsel (signed by HBS) Copies to counsel: 06.17.99 Page(s) : 4 (wcc)
6/17/97	51	PETITION for writ of habeas corpus; Date Received: 06.17.97 (5 volumes) (under separate cover) (wcc)

DATE	NO.	PROCEEDINGS
6/17/97	52	ORDER denying [42-1] motion for leave to file reply to respondent Johnson's opposition to petitioner's motion for an order allowing petitioner to file a petition for writ of HC before 04/24/97 with leave to file amended original petition by 06/17/97, denying [37-1] motion for leave to file Petition for Writ of HC before 04.24.97 with leave to file amended original petition by 06.17.97 (signed by HBS) Copies to counsel: 06.17.97 Page(s) 1 (wcc)
6/17/97	53	ORDER REFERRING CASE to Magistrate Judge Jeff Kaplan (signed by HBS) Copies to counsel: 06.17.97 Page(s): 1 (wcc)
6/18/97	54	ORDER denying [43-1] motion to strike petitioner's ex parte sealed motions for investigative funds (signed by HES) Copies to counsel: 06.18.97 Page(s) 2 (wcc)
6/20/97	55	ORDER to show cause, set answer due for 9/15/97 for Director TDCJ (signed by JKaplan) Copies to counsel: CMRRR 6/20/97 Page(a) 1 (ldf) [Entry date 06/23/97]
7/8/97	56	CERTIFIED MAIL executed as to Director TDCJ 7/1/91 [55-3] order (1) (jas)
7/21/97	57	SEALED DOCUMENT placed in sealed area (jas)

DATE	NO.	PROCEEDINGS
7/28/97	58	ORDER that the Court's 6/16/97 memorandum Order is amended as follows: counsel shall submit vouchers once every two months, see order for specifics (signed by Magistrate Kaplan) Copies to counsel: 7/28/97 Page(s) 1 (jas)
8/12/97	59	Amended PETITION for writ of habeas corpus; Date Received; 6/12/97 (15+) (USC) (jas) [Entry date 08/13/97]
8/22/97	60	MOTION with memorandum in support by defendant Director TDCJ to substitute Erik Everett Cary for Laura Hayouth Popps (3) (jas)
8/22/97	61	MOTION with memorandum in support: by defendant Director TDCJ to extend time within which to file a responsive pleading (3) (jas)
8/22/97	62	ORDER granting (60-1) motion to substitute Erik Everett Cary for Laura Bayouth Popps (signed by Magistrate Kaplan) copies to counsel: 8/25/97 Page(s) 1 (jas) [Entry date 08/25/97]
8/22/97	63	ORDER granting [61-1] motion to extend time within which to file a responsive pleading reset answer due for 9/18/97 for Director TDCJ (signed by Magistrate Kaplan) Copies to counsel: 6/25/97 Page(s) 1 (jas) [Entry date 08/25/97]
9/2/97	64	SEALED DOCUMENT placed in sealed area (Jas)

DATE	NO.	PROCEEDINGS
9/19/97	65	ANSWER to Complaint by defendant Director TDCJ and Motion for Summary Judgment and Supporting Brief (15+) (jas)
9/19/97	65	MOTION with memorandum in support by defendant Director TDCJ for summary judgment (15+) (jas)
9/24/97	66	NOTICE of Re-Designation of Attorney-In-Charge by plaintiff Thomas Joe Miller-El (2) (Jas)
9/24/97	67	MOTION with memorandum in support by plaintiff Thomas Joe Miller-El for leave to file reply to respondent's answer and motion for sum jgm. on or before 11/7/97 (5) (jas)
9/25/97	68	ORDER granting [67-1] motion for leave to file reply to respondent's answer and motion for sum jgm. on or before 11/7/97 Response to motion reset to 11/7/97 for [65-1] motion for summary judgment (signed by Magistrate Kaplan) copies to counsel: 9/25/97 Page(s) 1 (Jas)
9/25/97	69	Minute order: Ex Parte Hearing re: Attorney fees Held before Magistrate Judge Jeff Kaplan, taken under advisement; supplemental materials due by end of the week Court Reporter: electronic (2) (jas) [Entry date 09/26/97]
10/17/97	70	SEALED DOCUMENT placed in sealed area (jas)
10/21/97	71	SEALED DOCUMENT placed in sealed area (Jas) [Entry date 10/22/97]

DATE	NO.	PROCEEDINGS
11/6/97	72	Unopposed MOTION by plaintiff Thomas Joe Miller-El to extend time/to reschedule due date for petitioner's reply to appellant's answer (3) (jas) [Entry date 11/07/97]
11/7/97	73	ORDER granting [72-1] motion to extend time/to reschedule due date for petitioner's reply to appellant's answer; the reply is now due on 11/10/97. (signed by Magistrate Kaplan) Copies to counsel: 11/10/97 Page(s) 1 (jas) [Entry date 11/10/97]
11/10/97	74	CROSS MOTION for summary judgment by plaintiff Thomas Joe Miller-El (3) (Jas) [Entry date 11/12/97]
11/10/97	75	Reply to respondent's answer and MEMORANDUM by plaintiff Thomas Joe Miller-El in support of [74-1] cross motion for summary judgment (15+) (USC) (jas) [Entry date 11/12/971
11/18/97	76	SEALED DOCUMENT placed in sealed area (Jas)
11/19/97	77	**UNFILED PER ORDER UNFILING PLEADING 12/5/97** NOTICE of intent to supplement the record and to file motions for discovery and an evidentiary hearing by plaintiff Thomas Joe Miller-El (15+) (jas) (Entry date 11/20/97] [Edit date 12/06/97]
11/24/97	78	SEALED DOCUMENT placed in Sealed area (Jas)

DATE	NO.	PROCEEDINGS
12/5/97	79	ORDER unfiling [77-1] notice by plaintiff Thomas Joe Miller—El due to the following deficiency: FRCP make no provision for the filing of such a notice. copies to counsel: 12/8/97 (signed by judge Jeff Kaplan Page (s) 2 (jas) [Entry date 12/08/97]
12/8/97	80	MOTION by plaintiff Thomas Joe Miller-El for discovery (17) (jas)
12/8191	81	MOTION by plaintiff Thomas Joe Miller-El in the alternative to petitioners cross-motion for sum jgm for an evidentiary Hearing (12) (jas)
12/8/97	82	Supplemental MEMORANDUM by plaintiff Thomas Joe Miller-El on Batson/Swain claim based on previously unavailable evidence (15+) (USC) (jas)
12/8/97	83	MOTION by plaintiff Thomas Joe Miller-El for leave to file supplemental briefing or in the alternative to amend (6) (jas) [Entry date 12/10/97]
4/24/98	84	SEALED DOCUMENT placed in sealed area (jas) [Entry date 04/27/98]
4/27/98	85	SEALED DOCUMENT placed in sealed area (jas) [Entry date 04/28/98]
6/16/98	86	SEALED DOCUMENT placed in sealed area (jas) [Entry date 06/17/98]
6/30/98	87	SEALED DOCUMENT placed in sealed area (lch) [Entry date 07/02/98]

DATE	NO.	PROCEEDINGS
3/3/99	88	MOTION by plaintiff Thomas Joe Miller-El for execution date (1) (Jas) [Entry date 03/08/99]
3/8/99	89	ORDER re: pla's mtn for execution date; petitioner shall file a response to this order by 3/19/99 and respondent shall file a response by 3/30/99 re: whether an execution date has been set and whether petitioner wants to dismiss his application for writ of habeas corpus or proceed with the case, See order for specifics (signed by Magistrate Kaplan) Copies to counsel: 3/8/99 Page(s) 2 (jas)
3/17/99	90	AFFIDAVIT by plaintiff Thomas Joe Miller-E1 Re: (89-1) order (1) (jas) [Entry date 03/18/99]
3/19/99	91	Memorandum to the Court/RESPONSE by plaintiff Thomas Joe Miller-El to [89-1] order (5) (jas) [Entry date 03/22/99]
3/30/99	92	RESPONSE by defendant Gary Johnson to [89-1] order (4) (jas) [Entry date 03/31/99]
3/31/99	93	ORDER petitioner has reaffirmed his desire to prosecute this death penalty habeas case . . the Court will disregard any statements to the contrary contained in petitioner's letter dated 2/27/99. (signed by Magistrate Kaplan) Copies to counsel: 3/31199 Page(s) 1 (jas)

DATE	NO.	PROCEEDINGS
7/28/99	94	ORDER . . .The parties are directed to answer these issues (specified in this order) in a written response; petitioner shall file him response to this order by 08/16/99: Respondent shall file his response by 08/31/99; Responses]ball not exceed 15 pages in length; No further pleadings will be allowed w/out leave of court (signed by Magistrate Judge K counsel: 07.28. 99 Page (s) 3 (lag)
8/16/99	95	Supplemental Court-Ordered Briefing/ RESPONSE by plaintiff Thomas Joe Miller-El to [94-1) order (17) (jas) [Entry date 08/17/99]
9/2/99	96	Supplemental Court-ordered Briefing on Procedural issues/RESPONSE by defendant Gary Johnson to [94-1] order (6) (jas) [Entry date 09/03/99]
12/3/99	97	SEALED DOCUMENT placed in sealed area (svc) [Entry date 12/06/99]
12/8/99	98	SEALED DOCUMENT placed in sealed area (amy)
12/10/99	99	SEALED EX PARTE DOCUMENT placed in sealed area (svc) [Entry date 12/13/99]
12/15/99	100	SEALED DOCUMENT placed in sealed area (svc) [Entry date 12/16/99]
12/15/99	101	SEALED DOCUMENT placed in sealed area (svc) [Entry date 12/16/99]

DATE	NO.	PROCEEDINGS
1/31/00	102	FINDINGS, CONCLUSIONS AND RECOMMENDATIONS Petitioner's application for Habeas Corpus should be denied Signed by Judge Kaplan, copies to cnsl: 1/31/00 Case no longer referred to Magistrate Judge Jeff Kaplan Objections to F and R due by 2/16/00 (15+) (nmc) [Edit date 02/10/00]
1/31/00	—	PRELIMINARY ASSIGNMENT TO Magistrate Judge Jeff Kaplan (nmc)
1/31/00	103	ORDER Instructions for service and notice of right to object (signed by Judge Kaplan) Copies to counsel: 1/31/00 Page(s) 2 (nmc)
2/7/00	104	CERTIFIED MAIL executed as to Gregory W Wiercioch 2/2/00 (102-1) findings & recommendations (nmc) [Entry date 02/08/00]
2/7/00	105	CERTIFIED MAIL executed as to James Marcus 2/2/00 [102-1] findings & recommendations (nmc) [Entry date 02/08/00]
2/7/00	106	CERTIFIED MAIL executed as to James Marcus 2/2/00 [102-1] findings & recommendations (nmc) [Entry date 02/08/00]
2/7/00	107	CERTIFIED MAIL executed 2/2/00 [102-1] findings & recommendations (nmc) [Entry date 02/08/00]
2/7/00	108	CERTIFIED MAIL executed as to Thomas Joe Miller-E1 2/3/00 [102-1) findings & recommendations (nmc) [Entry date 02/08/00]

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DATE	NO.	PROCEEDINGS
2/10/00	109	Unopposed MOTION by plaintiff Thomas Joe Miller-E1 to extend time to file objections to Magistrate Judge's findings and recommendations (3) (nmc)
2/10/00	110	ORDER granting [109-1] motion to extend time to file objections to Magistrate Judge's findings and recommendations Objections reset to 2/25/00 for [102-1] findings & recommendations (signed by Judge Sanders) Copies to counsel; 2,11,00 Page (s) 1 (mln) [Entry date 02/11/00]
2/25/00	111	MOTION by plaintiff Thomas Joe Miller-E1 for oral argument on petitioner's objections to the Magistrate judge's memorandum and recommendation (6) (nmc) [Entry date 02/28/001
2/25/00	112	OBJECTION by plaintiff Thomas Joe Miller-E1 to (102-11 findings & recommendations (15+) (nmc) [Entry date 02/28/00]
2/28/00	113	Corrected OBJECTION by plaintiff Thomas Joe Miller-E1 to [102-1] findings & recommendations (15+) (nmc) [Entry date 02/29/00]
3/7/00	114	ORDER The court will hear oral argument on Findings and Recommendation and petitioner's objections on 3/22/00 at 2:00 (signed by Judge Sanders) Copies to counsel: 3/8/00 Page (s) 1 (nmc) [Entry date 03/08/00]

DATE	NO.	PROCEEDINGS
3/15/00	115	Unopposed MOTION by defendant Gary Johnson to continue (3) (nmc) (Entry date 03/16/001
3/15/00	116	Letter from Ann Kraatz notifying that she is now that attorney for Johnson (nmc) (Entry date 03/17/001
3/17/00	117	ORDER granting [115-1] motion to con—tinue The oral argument is reset for 4/28/00 at 2:00 (signed by Judge Sanders) copies to counsel: 3/17/00 Page(s) I (nmc)
4/28/00	118	Minute order: Oral Argument re: Findings and Recommendation of US Magistrate Judge Kaplan Held before Senior Judge Barefoot Sanders Court Reporter: Janet Wright . . . Oral Argument concluded. Order to be forthcoming (1) (vdf) [Entry date 05/01/00]
5/8/00	119	POST ARGUMENT BRIEF by plaintiff Thomas Joe Miller-E1 (8) (vdf)
5/17/00	120	APPLICATION/MOTION by plaintiff Thomas Joe Miller-E1 for Andrew Hammel to appear pro hac vice (3) (vdf) [Entry date 05/18/00]
5/17100	120	ORDER granting [120-1] motion for Andrew Hammel to appear pro hac vice (signed by Judge Sanders) Copies to 05/16/00 Page(s) 3 (vdf) [Entry date 05/18/00]

DATE	NO.	PROCEEDINGS
6/5/00	121	MEMORANDUM OPINION AND ORDER . . . The Court Adopts the Magistrate Judge's Findings and Recom-mendations. Miller-El's petition for writ of habeas corpus is hereby DENIED. (See order for specifics) (signed by Judge Sanders) Copies to counsel: 06/05/00 Page(s) : 6 (vdf)
6/5/00	122	JUDGMENT against plaintiff Thomas Joe Miller-E1 . . . This Judgment is entered pursuant to the Court's Memorandum Opinion and Order dated 06/05/00. It is ordered that the Court that petitioner Thomas Joe Miller-El's Petition for Writ of Habeas Corpus be, and the same is hereby, DENIED and DISMISSED. (signed by Judge Sanders) Copies to counsel: 06/05/00 Page (s) : 1 (vdf)
6/5/00	—	Case closed (vdf)
6/19/00	123	MOTION by plaintiff Thomas Joe Miller-E1 to alter or amend judgment pursuant to Rule 59(e) of the Federal Rules of Civil Procedure (12) (vdf)
6/21/00	124	ORDER denying (123-11 motion to alter or amend judgment pursuant to Rule 59(e) of the Federal Rules of civil Procedure (See order for specifies) (signed by Judge Sanders) Copies to counsel; 06/22/00 Page(s) 1 (vdf) [Entry date 06/22/00]
7/20/00	125	NOTICE 0f APPEAL by plaintiff Thomas Joe Miller-E1. re [124-1] order payment: No fee paid TO Mailed (3) cc:Judge (jmr)

DATE	NO.	PROCEEDINGS
7/20/00	—	Notice of appeal and certified copy of docket to USCA: [125-1] appeal (jmr)
7/27/00	—	USCA Case Number, 00-10784 Re: (125-1J appeal USCAS received ROA 7/24/00 (jmr)
8/2/00	126	MOTION by plaintiff Thomas Joe Miller-El for certificate of appealability (8) (nmc) [Entry date 08/03/00]
8/8/00	127	Transcript order form from Attorney for Plaintiff: Transcript requested [125-1] appeal 4/28/00 Oral Argument, Court Reporter is 7anet Wright (jmr)
8/14/00	128	FINDINGS, CONCLUSIONS AND RECOMMENDATIONS of Magistrate Judge Jeff Kaplan Re; (126—1) motion for certificate of appealability should be denied; IFP should be granted Motion no longer referred (2) cc;Judge (jmr)
8/14/00	128	ORDER ADOPTING [128-1] findings & recommendations (Signed by Judge Sanders) Copies to counsels 8/14/00 Page(s): 2 (jmr)
8/14/00	128	ORDER denying [126-1] motion for certificate of appealability is denied proceed in forma pauperis is granted (signed by Judge Sanders) Copies to counsel: 8/14/00 Page (s) 2 (jmr)
8/14/00	—	Deadline updated; appeal record due set for 8/28/00 for [125-1] appeal (jmr)

DATE	NO.	PROCEEDINGS
8/28/00	—	Transmitted record on appeal 12 vol, record, 1 Sealed vol. and 13 SCR folders to U.S. court of Appeals; [125-1] appeal (jmr) [Entry date 08/23/00] [Edit date 08/28/00]
10/11/00	129	TRANSCRIPT filed Appeal record due on 10/26/00 [125-1] appeal, for date of 4/28/00 Oral Argument (jmr)
10/31/00	—	Transmitted supplemental record of 4/28/00 transcript on appeal: [1251] appeal (jmr)
8/9/01	130	OPINION of USCA . . . COA is denied (certified copy) in accordance with USCA judgment re: [125-1] appeal (21) cc; Judge (jmr)
8/13/01	—	Record on appeal returned 12 vol. record, 1 transcript, 11 SCR folders and 2 sealed vols. from U.S. Court of Appeals: appeals (jmr)

US COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed 07/124/00]

00—10784

THOMAS JOE MILLER—EL,
Petitioner—Appellant,

v.

JANIE COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION,
Respondent—Appellee.

DOCKET ENTRIES

DATE	PROCEEDINGS
7/24/00	Death penalty case docketed, NOA filed by Appellant Thomas Joe Miller-E1 [00-10784] (mrw)
7/24/00	Criminal Justice Act 20 voucher issued to Andrew A Hammel for Appellant Thomas Joe Miller-E1 . (00-10784 (jar)
7/24/00	Criminal Justice Act 20 voucher issued to James William Marcus for Appellant Thomas Joe Miller-El . (00-10784) (jar)
8/4/00	Appearance form filed by An Kraatz for Appellee Gary L Johnson. X00—107841 (mrw)

DATE	PROCEEDINGS
8/7/00	Transcript order received from Appellant Thomas Joe Miller-E1 for Court Reporter Janet Wright. Date of Hearing: 4/28/00. [00—10784] Transcript order ddl satisfied. Ct. Reporter Acknowledgment due on 8/22/00 for Janet Wright (mrw)
8/10/00	Appearance form filed by James William Marcus for Appellant Thomas Joe Miller-El.[00-10784] (mxw)
8/17/00	District Court order-COA denied. Date Denied: 8/14/00 [00-10784] Awaiting DC Action ddl satisfied. (mrw)
8/24/00	Transcript order acknowledgment received from Court Reporter Janet Wright. Estimated pages: 35 Date Financial Arrangements Made: 8/4/00 [00-10784] Ct. Reporter Acknowledgement ddl satisfied. Transcript due on 9/5/00 for Janet Wright. Ct. Reporter Discount Date is 10/4/00 for Janet Wright. (mrw)
8/30/00	Record on appeal filed. Vol(s) of Pleadings; 13 Exhibits: +4 Boxes (Containing 11 folders of SCP) SEALED: 2 Envelopes. (1 contains volume #4) and (1 contains Exhibits) [00-10784] (Mrw)
10/18/00	Discount of 10 percent invoked for Court Reporter Janet Wright [00-10784] Transcript ddl updated to 11/6/00 for Janet Fright. Ct. Reporter Discount Date updated to 11/6/00 for Janet Wright. (mrw)
11/3/00	Supplemental record on appeal filed. Supplement #: 1 Vol (s) of Transcripts: 1 [00—10784] Transcript Deadline Satisfied. Court Reporter Discount Date Cancelled. (mrw)

DATE	PROCEEDINGS
11/6/00	BR-7 Letter issued to parties since COA denied in District Court. [00-10784] Motion for COA due on 12/18/00 for Thomas Joe Miller-E1. Brief in Support of COA due on 12/18/00 for Thomas Joe Miller-E1. (mrw)
11/7/00	Record on appeal released to attorney James William Marcus for Appellant Thomas Joe Miller-E1. Volumes: 12 (Vols 1-3 & 5-13, only) Supplemental Volumes: 1. [00-10784] (lxc)
12/1/00	Extension granted bar phone until: 1/17/01 to file Motion for COA & Brief in Support for Appellant Thomas Joe Miller-E1. [00-10784] (mrw)
12/4/00	Confirmation letter filed by Appellant Thomas Joe Miller-E1 confirming an extension of time to and including 1/17/01 for filing Motion for COA & Brief. [00-10784] Motion due dd,l updated to 1/17/01 for Thomas Joe Miller-El. Brief in Support ddl updated to 1/1?/01 for Thomas Joe Miller-E1. (mrw)
12/5/00	Attorney motion filed by James William Marcus far Appellant Thomas Joe Miller-E1 to substitute counsel Elizabeth Detweiler for Andrew Hammel (3073649-11 [00-10784] (mrw)
12/8/00	COURT order filed granting attorney motion to substitute counsel [3073649-1] (attorney Andrew A Iiammel for Thomas Joe Miller-El terminated) Atty added: Elizabeth Detweiler (HRD) Copies to all counsel. [00-10784] (mrw)
12/12/00	Criminal Justice Act 20 voucher issued to Elizabeth Detweiler for Appellant Thomas Joe Miller-El . [00-10784] (jar)

DATE	PROCEEDINGS
1/10/01	Motion filed by Appellant Thomas Joe Miller-E1 to file brief in support of COA in excess of the word count limitation but not to exceed 28,000 words. [3106144-1] [00-10784] (mrw)
1/18/01	COURT Order filed granting appellant's motion to file brief in support of COA in excess of the word count .imitation, but to to exceed 28,000 [3106144-1] (HRD) Copies to all counsel. [00-10784] (mrw)
1/22/01	Motion filed by Appellant Thomas Joe Miller-El for certificate of appealability [3114865-1] Motion due ddl satisfied. [00-10784] (mrw)
1/22/01	Brief filed in support of motion for Certificate of Appealability (Incorporated in motion) [3114865-1] by Appellant Thomas Joe Miller-El Brief in support ddl satisfied. [3114867-1] [00-10784] (mrw)
1/22/01	Record on appeal returned to 5CCA. Volumes: 1-3 & 5-13 supplemental Volumes: 1 [00-107841 (mrw)
2/12/01	Extension granted by phone until: 3/23/01 to file response to COA for Appellee Gary L Johnson. [00-10784) (mzw)
2/21/01	Confirmation letter filed by Appellee Gary L Johnson confirming an extension of time to and including 3/23/01 for filing Response to COD. [00-10764] (mrw)
3/23/01	Response/opposition filed by Appellee Gary L Johnson to motion for Certificate of Appealability [3114865-1] by Appellant Thomas Joe Miller-E1 Response/Opposition ddl satisfied. [3172759-1] [00-10784] (mrw)

DATE	PROCEEDINGS
4/2/01	Motion filed by Appellant Thomas Joe Miller-El [3181515-1] for leave to file reply to response/opposition [3172759-1] by Appellee Gary L Johnson [00-10784] (mrw)
4/5/01	COURT order filed granting appellant's motion for leave to file reply to respondent's response/opposition to COA by 4/13/01 [3181575—1] (HAD) Copies to all counsel. [00—10784] (mow)
4/13/01	Reply filed by Appellant Thomas Joe Miller-El to response/opposition [3172759-1), motion for Certificate of Appealability [3114865-1] [3195886-1] [00-10784] (mrw)
5/21/01	Criminal Justice Act 20 received from James William Marcus for Appellant Thomas Joe Miller-El, Appellant Thomas Joe Miller-El Timely: y/final payment request. [00-10784] (cgp)
5/21/01	Criminal Justice Act 20 received from Elizabeth Detweiler for Appellant Thomas Joe Killer-El Timely: y/interim request #1. [00-10784] (cgp)
8/7/01	Opinion order filed denying appellant's motion for Certificate of Appealability. (ISSUED AS AND FOR THE MANDATE) [3114865-1] Issd in T form? y Judge EHJ HRD RMP [00-10784] (jma)
8/7/01	Mandate issued, Approved BOC Issued (Y/N)?: n [00-10784] (Ima)
8/9/01	Record on appeal returned to 5CCA, Volumes: 13 supplemental Volumes: 1 Exhibits; 4 Boxes (Containing 11 folders SEALED: 2 Envelopes (volume #4) 6 (1 Containing Exhibits) [00-10784] Case Management ddl satisfied. (mrw)

DATE	PROCEEDINGS
8/9/01	Record on appeal returned to USDC. Volumes: 13 Supplemental Volumes: 1 Exhibits: 4 Boxes (containing 11 folders SEALED: 1 Env. [00-10784] (mrw)
8/21/01	Petition filed by Appellant Thomas Joe Miller-El for rehearing. # of copies filed: 4 sufficient [Y/N]: N need copy of court's opinion (3350091-11 Sufficient Rehearing due on 8/31/01 for Thomas Joe Miller-El . [00-10784] (mrw)
8/21/01	Petition filed by Appellant Thomas Joe Miller—El for rehearing en banc. # of copies filed: 20 Sufficient [YIN]: N copy of court's original opinion [3350358—1] [00—10794] (mrw)
8/23/01	Rehearing made sufficient by Appellant Thomas Joe Miller-El [00-10784] Sufficient Rehearing ddl satisfied. (mrw)
9/12/01	COURT Order filed denying petition for rehearing [3350091-1], denying petition for rehearing en banc [3350358-1] With poll (Y/N)?: N Copies to all counsel. [00-10184] .(mrw)
1/18/02	Supreme Court notice that petition for certiorari was filed on 12/11/01 by Appellant Thomas Joe Miller-El. Supct No.: 01-7662 [00-10784] (cav)
2/15/02	Supreme Court order received granting petition certiorari [3486654-1] by Appellant Thomas Joe Miller-El on 2/15/02. [00-10784] (Mrw)

JURY SELECTION IN A CRIMINAL CASE

It is often said that most cases are won or lost on Voir Dire—I agree. It is the first opportunity you have to impress the panel with your sincerity, integrity and ability. I believe in the importance of first impressions; if you can show—the panel that you wear the "white hat," and if you don't destroy that illusion during the trial, then the jury will *want* to convict. Who you select for the jury is, at best, a calculated risk. Instincts about veniremen may be developed by experience, but even the young prosecutor may improve the odds by the use of certain guidelines—if you know what to look for.

First and foremost, you are dealing with people, and there are no hard and fast rules governing who will be a good State's juror. Who you select, and what you qualify the panel on will depend on the type of crime, the age, color and sex of the Defendant, the rules of the Court, the personality of the defense attorney, and your own individual style and judgement.

The following outline contains very little substantive law because I presume that any prosecutor is as able to look it up as I. The outline does, however, contain one prosecutor's ideas on some things that need to panel , and some things to look for in a juror.

I. Purpose of Voir Dire.

A. Legal purpose.

1. To qualify jurors on law regarding case.

2. To become acquainted with veniremen so that you may use your strikes intelligently.

B. Tactical Purpose.

1. Allow the veniremen to be impressed with you and your cause.

2. Explain the law in the manner most beneficial to the State.

II. Preparation for Voir Dire. In many counties, the prosecutor selecting the jury will not present the evidence.

A. Look up and learn the law regarding the particular offense to be tried.

1. List and remember the elements of the offense.

2. Understand and remember any definitions of words of art applicable to the offense.

B. Be well acquainted with facts of your case.

1. Learn what general law—will be applicable to the facts.

2. Learn all weaknesses in the case in order to prepare the jury.

C. If you do not know the judge well, discuss Voir Dire with him in advance.

1. It will allow you to know where you stand on ques—
tionable issues so that you will not be embarrassed in front of the panel by an ruling.

2. If the judge usually conducts Voir Dire himself , he may allow the lawyers to do it if adverse asked—this is always preferable.

III. What to look for in a juror.

A. Attitudes.

1. You are looking for a strong, stable, individual who believes that Defendants are different from them in kind, rather than degree.

2. You are not looking for any member of a minority group which may subject him to oppression—they almost always empathize with the accused.

3. You are not looking for the free thinkers and flower children.

B. Observation is worthwhile.

1. Look at the panel out in the hall before they are seated. You can often spot the showoffs and the liberals by how and to whom they are talking.

2. Observe the veniremen as they walk into the courtroom.

a. You can tell almost as much about a man by how he walks, as how he talks.

b. Look for physical afflictions. These people usually sympathize with the accused.

3. Dress.

a. Conservatively, well dressed people are generally stable and good for the State.

b. In many counties, the jury summons states that the appropriate dress is coat and tie. One who does not wear a coat and tie is often a non—conformist and therefore a bad State's juror.

4. Women.

a. I don't like women jurors because I can't trust them.

b. They do, however, make the best jurors in cases involving crimes against children.

c. It is possible that their "women's intuition" can help you if you can't win your case with the facts.

d. Young women too often sympathize with the Defendant; old women wearing too much make—up are usually unstable , and therefore are bad State's jurors.

e. It is impossible to keep women off your jury, but try to keep the ratio at least seven to five in favor of men.

5. Weight. Extremely overweight people, especially women and young men, indicates a lack of self—discipline and often times in stability. I like the lean and hungry look.

6. Age. People over forty are more settled and more ready to believe that criminals should be punished.

7. Race. Minority races almost always empathize with the Defendant.

8. Demeanor.

a. Attentive, intelligent looking veniremen that you are able to communicate with on Voir Dire will generally be all right.

b. Always observe how the veniremen react when being questioned by the defense attorney, and compare it to the venireman's reaction to you.

IV. Your approach to the jury panel.

A. When the judge is talking to the panel.

1. Sit at the counsel table with your chair turned at an angle so that you can see the judge and the panel; ie, never turn your back to the panel.

2. Sit upright and have some eye contact with the panel.

B. When you are talking to the jury panel.

1. Stand upright and be as loose and at ease as possible.
2. Stand close to the panel. The further you are away, the more distant seems the communication.
3. Don't pace, but some movement may aid in keeping their attention.
4. Use your notes as little as possible.
5. Smile, be pleasant, but not too jovial; impress them with your earnestness.

V. Speaking to the entire panel.

A. Introductory. .

1. Introduce yourself, tell your position, who you work for and who you represent.
2. Introduce the Defendant and his attorney(s), asking if anyone knows them either personally or by reputation. Don't dignify the Defendant by calling him "Mister", or using his first name.
3. Orient the panel (if the judge does not) as to what Court they are in, the jurisdiction of the Court (as to felony vs. misdmeanor), explain the difference and explain that your purpose is to find twelve fair and impartial people to serve on this jury—people that can be just as fair to the State as you *know* they will be to the Defendant.

a. This approach makes it appear that the State is the underdog—most people will pull for the underdog.

b. Reasons for briefly orienting the panel.

(1) Most veniremen are ignorant of any spe—cifics regarding the Courts and the legal procedures.

(2) It gives the panel the feeling that you are trying to aid them.

4. Explain their duties as jurors.

a. They are not expected to know the law and, the judge will give them all the law of the case in the Court's charge.

b. The jury is to determine the f acts of the case, the credibility of the witnesses, and the weight to be given their testimony.

(1) The jury may believe all, any part of, or nothing that any witness says.

(2) They may look to the witness demeanor motive or bias, reasonableness of what is said—using their common sense to guide them.

c. If you know that the Defendant has more witnesses than you, explain that numbers are not decisive, and they may disbelieve one hundred witnesses in favor of the testimony of one.

B. Qualifying the panel on the general law. This is the law applicable to every criminal case.

1. Presumption of innocense.

Tell the jury

a. All Defendants in a criminal case, no matter what they are cha,ged with, are presumed to be innocent.

b. It is a legal presumption and just because they are presumed to be innocent does not mean that he (the Defendant) did not commit the crime.

c. This presumption lasts only until the State removes it by proving its case to their satisfaction beyond a reasonable doubt.

2. Burden of proof—beyond a reasonable doubt.

Explain that:

a. The State understands that burden and willingly accepts it, or else would not be here.

b. Though we accept our burden, we wish to be held to no higher burden, such as; beyond any doubt, or beyond a shadow of a doubt.

c. A mere discrepancy in evidence is not reasonable doubt.

d. The doubt must be reasonable, and it must be a reasonable doubt applicable to one of the elements of the offense that the law requires the State to prove to entitle it to a conviction.

3. Defendant's failure to testify.

Explain that:

a. The Defendant may call witnesses in his own behalf if he chooses, and may subpoena any witness that could help him.

b. The Defendant may testify in his own behalf if he chooses, but if he should decide not to testify, we who represent the people can not call him as a witness and they, the jury, could not consider his failure to testify as any evidence.

c. If he should so choose to testify, they must consider his credibility; looking to his demeanor, the reasonableness of his testimony, and his motives for lying—what he has to gain or lose.

d. Just because he is presumed to be innocent, does not mean that he is presumed to be a truth teller.

C. Qualifying the panel of the law of your case.

1. Carefully explain the elements of the offense as listed in the indictment and advise the panel that the State must prove these things, but none other.

2. Define any words of art that are necessary to your case and distinguish the legal meaning from the usual meaning, such as:

a. "Intoxication" is not necessarily drunk.

b. "Malice" is not premeditation.

c. "Possession" is not ownership.

d. "On or about" means accessable.

e. "Assault" does not require a touching.

f. "Carnal knowledge" requires only penetration.

3. Give examples when you explain the law. The examples should be of a crime less aggravated than the one you intend to prove, so when you pre—sent your facts the jury will think it is a highly aggravated crime.

4. Qualify the panel on defensive issues.

a. The defense attorney will do this anyway, so you tell them first and in the light most beneficial to the State.

b. Circumstantial evidence.

(1) Explain that it is a type of evidence , and is different only in kind to direct evidence. Tell them that fingerprints are circumstantial evidence.

(2) Give examples of circumstantial evidence.

5. Punishment.

a. This is the most important qualifying issue.

(1) In many cases the only issue is that of punishment. A case is never won unless a jury returns more time than you offer on a plea of guilty.

(2) A person weak on the maximum punishment will gene rally be weak on guilt.

b. Tell the jury that the State intends to ask the jury a sentence for "life" (or a substantial number of years, etc.) at the close of the testimony.

(1) This can backfire unless you have evaluated the case and know that you can ask "life" (etc.) without looking ridiculous.

(2) This is a good approach because it gives the jury time to get used to the idea of a high verdict.

(3) It allows you to argue on punishment that you have been fair with them (the jury) from the outset by telling them what you would be seeking.

c. Always stress the maximum in the range of punishment, but advise and qualify the panel on the minimum—otherwise, you may lose your aura of extreme fairness.

d. Probation.

(1) Ask the judge to require the application for probation to be filed before jury selection so you may qualify the jury.

(2) Explain the probation law to the panel, and that just because a person may be eligible for probation, does not mean that he is entitled to probation.

(3) On heavy cases such as murder, rape and robbery, etc:

(aa) Explain that every Defendant, no matter what he is charged with falls within the probation lair.

(bb) The minimum punishment, especially probation, is fertile ground for the defense disqualifying a juror for cause. Since you talk to the panel first, you can prevent the disqualification of a strong juror.

(11) Explain that they don't have to be able to *think* of a murder case where the Defendant may deserve probation, but if one *should* come along, and they thought it was the right thing to do, they could—vote it.

(22) Couch the question in terms of what a "fair" person would do (no one considers themselves unfair.)

(4) Always tell the jury that the State is opposed to probation in this case.

e. Tell the panel about a bifurcated trial and that on punishment they may consider all of the evidence introduced on the guilt or innocence phase of the trial, and also the reputation, character and prior criminal record, if any, evidence of which may be admitted on the punishment hearing.

(1) The above is a true statement of the law, and any judge should allow a prosecutor to so advise the jury.

(2) Stress the words, "and prior criminal record", because it will dispell the jury's beliefs that a Defendant's record will be admitted on the guilt or innocence hearing.

f. Talk in terms of a "sentence" of life, etc. stressing the word "sentence". This will convey to the panel the fact that he will be paroled early.

g. The State has no burden of proof on punishment as it does on guilt. We need not prove beyond a reasonable doubt that the Defendant deserves any Particular sentence—it is the jury's job to make the punishment fit the crime.

VI. Questioning the veniremen individually—this is done after addressing the panel as a whole.

A. Demeanor, preliminaries and helpful hints.

1. The questioning will progress much more smoothly if you can persuade the Court to seat the veniremen in the order that they are listed.

2. Be pleasant and respectful. Use "Yes, sir" or "Yes, Ma'am", and never talk down to a venireman.

3. Remember that the veniremen are probably self concious; the more at ease you are with them the more they will be at ease and honest xxxx you.

4. Never give any indication to the panel as to whom you will strike.

5. Look at the venireman's eyes and throat during your questioning (especially relating to punishment).

6. Rate your venireman from one to five in the order of his desirability.

a. This will allow you to concentrate on the individual and his answers rather than writing.

b. If you want a record of their answers, have someone else in Court take notes.

7. In striking your lists be careful; more than one prosecutor has left an undesirable venireman on the jury as a result of striking the wrong name.

B. Questioning the venireman individually.

1. Ask the length of residence in the county.

a. People that move around very much are often unstable.

b. If the venireman have not lived in the county long, ask where they were born and reared.

(1) People from small towns and rural areas generally make good State's jurors.

(2) People from the east or west coasts often make bad jurors.

2. Who their family consists of.

a. People with a family are generally more responsible and therefore better jurors.

b If the venireman has children, ask their ages if the case is one involving a crime against children, or the Defendant is young.

3. Occupation.
   a. Ask a man "what is your profession or occupation?". Ask a woman "Are you employed outside the home?"
   b. Working men.
      (1) If a man is unemployed it may indicate instability.
      (2) Men who are self—made successes, or work with their hands, or work in a managerial capacity are usually good.
      (3) Technical jobs (engineers, accountants and scientists). There are two theories:
         (a) They will pick your case apart, therefore, they are bad.
         (b) They are not inclined to "chase rabbits" thrown out by defense attorneys, there—fore they are good.
      (4) Intellectuals such as teachers, etc. generally are too liberal and contemplative to make good State's jurors.
   c. Working women.
      (1) These women are often preferable to other women because they have had a glimpse of the cruel, hard world.
      (2) Women working in retail sales often make good State's juror's.
   d. Spouse's occupation is a good question because all people to a varying extent, are reflections of their spouse.

4. Ask if the venireman has any hobbies or interests that occupy their spare time.
   a. Active outdoors type hobbies indicate the best State's jurors.
   b. Hunters always make good State's jurors.
5. Ask men if they have ever served in the military; if so, when, what branch of the service, their rank upon discharge and if they saw combat. Marines, master sargeants and those that have seen combat generally make good State's jurors.
6. Ask veniremen their religious preference.
   a. Jewish veniremen generally make poor State's jurors. Jews have a history of oppression and generally empathize with the accused.
   b. Lutherans and Church of Christ veniremen usually make good State's jurors.
   c. Those that indicate that they have no religious preference are often nonconformists and bad State's jurors.
7. Ask veniremen if they have ever had a direct interest in the outcome of a criminal case.
   a. This is an interest in the sense that they, or a member of their family, or close personal friend has been charged with a crime.
   b. If someone volunteers, take him before the bench to illict further questions, rather than embarrass the venireman in front of the entire panel.
   c. Obviously, you don't want anyone who had a close friend or relative that was prosecuted by the State.

8. Ask the veniremen if they have previously served on a criminal jury.

   a. Experienced jurors usually are better for the State than the inexperienced Jurors.

   b. You may ask the veniremen anything about the prior case other than the verdict.

JURY SELECTION IN A CRIMINAL CASE

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[6] jury panel shuffled?

MR. KINNE: No, Your Honor.

THE COURT: Does the defense wish a shuffle?

MR. CUNNINGHAM: Give us one minute, Judge.

MR. NELSON: We're going to change our election. We changed our decision.

THE COURT: I'm going to recess the jury panel to accomplish the shuffle for the State and let the lawyers attend to that.

MR. WEST: The State had already indicated they were not going to shuffle. I object.

THE COURT: I'll overrule. You still have your election. I'll overrule your objection and I'll recess the jury panel for you to accomplish the first shuffle and bring them back at 12:30. If the defense wants a shuffle, we'll do that and I'll go ahead with the [7] next shuffle.

(Whereupon, the following proceedings were held in the presence and hearing of the jury panel.)

THE COURT: Ladies and gentlemen of the jury panel, a procedural matter came up that I needed to attend to. Many of you must be wondering about lunch, if you're going to get to eat. I'm going to recess you—all until 12:45. That is only an hour and five minutes. It will be crowded downstairs and there will probably be a line.

Since I have not started any part of voir dire, let me give you these instructions: Since you have been called up as a prospective jury panel in the case entitled the State of Texas versus Thomas Joe Miller-El—he is—the man in the blue that looks like a leisure suit-you-all should not [8] and may not discuss his case or anything you might know or think you

may hear about it. There should not be any conversation about it. If someone talks about the case in your presence, anyone says anything in your presence about Thomas Joe Miller-El, tell them you're on a jury panel and the Judge has instructed you not to talk about it. I don't think anyone will, but if they do, let me know.

When you come back at 12:45, we may change the order that you're seated in, so stay out in the hall and we'll call you in. Thank you, folks.

(Whereupon, the jury panel and this cause were recessed for lunch, after which the following proceedings were held out of the presence and hearing of the jury panel.)

MR. WEST: Your Honor, we [9] will shuffle.

THE COURT: What I'm going to do is—this shuffle is granted—I'm going to go ahead and do general voir dire and ask the juro. to take the questionnaires and complete them so we can accomplish that much since this is the last shuffle that we'll have.

(Whereupon, the following' proceedings were held in the presence and hearing of the jury panel.)

THE COURT: Good afternoon, ladies and gentlemen. Welcome back. Let me start out with what I have to say by giving you some general information, I did not give you much information this morning before I recessed you because, at that time, I wasn't prepared to go forward with any more of this part of the voir dire.

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[15] been returned to us, we then—I will assign some sort of order or schedule of jurors that we'll talk to one by one. I hope to do at least one this afternoon. Probably the first juror over here will be number one. I don't know who will be number one at that time, but be that as it may, somebody will be the first juror to start out with. If we can keep a schedule,

and I think we can after the bumpiness of today, were going to talk to as many as six a day. As slow as that may sound, that is not slow. If we can do six a day, we will have accomplished a lot.

So very candidly, anyone who, when we start our selection process, is beyond the first two rows is probably not going to be reached at all to be talked to. We will talk to you one at a time. The purpose of that is very [16] simple. It allows the lawyers and the Court and you to have very important direct one-on-one contact which, in this kind of case, we find very vital and very necessary.

I know that many of you—all are wondering to yourself, well, they told me downstairs this morning that it would be one day or one jury. Well, let me tell you a little bit about our schedule. We hope—we being all the lawyers and I—that this jury selection process will be completed within a month. We expect it will take at least four weeks including this week. You will discharge the initial part of your jury duty by coming for your individual questions probably one day this week. If you're not reached this week on the list, then you're discharged from any further service in this case. We [17] will start out with a new panel next Monday to get fifty more people up here and start out with the same process. We'll do that every Monday until we select a jury.

If you're not on the jury and you're not reached at all or, if you are reached and you're on the jury or excused, then you're through, your service has been discharged. If you are selected as one of the jurors—and obviously this group would provide one of our early members or several early members, hopefully—then you would be sworn in and given a date which we expect to start the trial. You would be called back when all twelve jurors are selected and the alternates that we decide to select and the case will be started.

The case, the lawyers tell me, itself will probably take

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[658] third one depending on what the evidence shows. What Mr. Macaluso was asking and I think what Mr. Cunningham asked, the same question, if it was, if the evidence shows beyond a reasonable doubt that the answer to number one should be yes and number two should be yes, that you would have to answer yes., What you said is, you would not want to be put in that position by having taken the oath initially because you could not answer yes to those based on your understanding that would result in the Defendant being assessed by the Court, not by you but by the Court, the death penalty? That's sort of a convoluted question, but is that—

MR. NELSON: That is, in effect, what I said, yes, sir.

THE COURT: All right. Now, I think something else that you

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[773] The time that he committed the offense cannot be convicted of the offense of murder because e was insane. Do you agree with that, sir?

A. Did I understand you to say, if someone were proven insane at the time?

Q. Yes, sir. In other words, if the insanity defense is raised by the accused and that fact is established by a preponderance of thee evidence, then the law says that person is excused because of the fact that he was insane.

A Yes.

Q. Therefore, he's not quality of the intentional and knowing taking of another person's life because he did not have his mental capacity to do it. He didn't know what he was doing. Do you agree with that, sir?

A. Yes.

Q. Also, the law says, when you get involuntary manslaughter, a person is not quality of murder. So we are taking all these and leaving nothing but where a person

intentionally kills another person. He knows that he's killing him and there is no justifications, no excuse whatsoever. In that instance—

[774] Mr. MACALUSO: Excuse me, Your Honor, I don't mean to—pardon, me MR Cunningham. I believe the statement was made that there is no excuse whatsoever. No legal excuse I think would be the proper phrase. There may be all sorts of considerations or excuses, but no legal excuse.

THE COURT: Your point is made. Do you understand that, Mr. Wagoner, that the law does justify and excuse certain kinds of killings. Mr. Cunningham has mentioned several situations, if you're insane, self—defense, an accident. For example, even though the may have intentionally or knowingly caused the death of somebody, which would be murder ordinarily, if you did it while you were insane or self—defense, then the law justifies or excuses you in those situations. I think [775] that's what Mr. Cunningham is talking about. There my be a lot of other reasons, so there's a difference. Do you understand?

Mr. WAGONER: I understood that what the gentleman has just asked me, in my mind is it a legal reason, is it a law, that says that this—things that might be asked by a lawyer, if its' a law, is there a excuse written in the law that would protect—I use the word protect—the individual or be excusable for this individual for that particular thing. Did I answer to your question to your satisfaction?

Q. Yes, sir. You've indicated that you served on a kidnapping case. Did the jury reach a verdict in that kidnapping case?

A. Yes, we did.

Q. In the robbery case, did the jury reach a verdict?

A. They were connected together.

Q. In other words, you heard evidence [776] on the kidnapping one day and then evidence on the robbery case the next day?

A. It was three days of four altogether and they were combined.

Q. You went out and decided whether or not he was quality of kidnapping and after resolving that issue, you went out and decided whether or not he committed the robbery?

A. Yes.

Q. And you—all were able to reach a verdict?

A. We did.

Q. Did any of the district attorneys talk with you after the case was over with?

A. No. I say no. I asked one of them a question on my own after it was all completely over with.

Q. Was that about what sentence he would receive?

A. No.

Q. About something that happened during the trial?

A. No. I just wondered who paid both lawyers. I asked him that question. I don't know why I did, but I did ask the question. It

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[842] on our list. That last juror then would be Ms. Hernandez.

Now, let me give two sets of instructions, ladies and gentlemen. First of all, a good or bad news, I'm not sure how it's going to be taken. From Ms. Freeman on to the end of that row, which would be Ms. Freeman, Ms. Bradford, Mr. Gossett, Mr. Smith and Mr. Melton, and all of the back row will be excused from jury service in this courtroom at this time and the central jury room asked me to return you to them so they could see if they're going to need you for something else. I don't know whether they do or not, but you—all will not be voir dired in this case. There's no sense in tying your

time up at this time with what's I'm getting ready to finish with the panel I'm retaining

I appreciate your patience

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[1529] A. Yes.

Q. All right. You can't receive the death penalty for that type of a murder. On the other hand, if you commit murder, knowingly or intentionally casuing the death of somebody, and you murder somebody who is a policeman or a fireman or a jail guard, and those people are acting in the lawful discharge of their duties—their on the job, in other words—and they're killed, then murder is elevated, raised up to the level of capital murder and you can receive potentially the death penalty for that. Do you see what I'm getting at?

A. Yes.

Q. Some other types of capital murder would be murder of a bunch of people, mass murders. That's new under the law. Do you remember when the were six or seven people killed in a bar about two years ago?

A. Yes.

Q. That could be a capital murder under the law. Or if you kill somebody for hire, if I hired Mr. Nelson to kill Mr. Cunningham, I could be tired for capital murder for hiring him and be tried for doing [1530] the actual killing. Both of us could get the death penalty for hiring yourself out as a killer. Or, as we've alleged here in this indictment, if you commit murder while you're either attempting to commit or area actually committing another felony offense. If you murder someone while you're robbing them, if you murder somebody while you're burglarizing somebody's home, if your murder somebody by arson or you kidnap somebody that you murder. Do you see what I'm getting at?

A. Yes, sir.

Q. We call that murder plus. Right off it's a murder plus another very serious felony offense. How do you feel about

this? Do you feel those are the types of cases, generally speaking, where you feel the death genalty would be appropriate, depending on the facts and circumstances?

A. Well, there again, I would say it depends on the case and the circumstances involved at the time.

Q. Okay. But depending upon those things that you mentioned earlier, do you feel, things that you mentioned earlier, do you feel, for example, a murder during a robbery where a person had a choice to kill or not to kill? Do you see? Do you feel that would be the type of case that you feel the death penalty would be warranted in?

A. I think if you had a choice, you know.

Q. Now, let me ask you: Have you ever felt differently about the death penalty at all? Have you ever felt it wasn't the thing the to do or it wasn't—we didn't need it or we shouldn't have it?

A. Well, there again, it goes back to the situation, you know, sometimes.

Q. You know, some people have just a general disapproval of the death penalty. I know some people go down to Austin to lobby against it and have it repealed. You never were like that, I guess?

A. No, I've never—you know just as far as generally speaking, I've never.

Q. You feel it's proper on a case-by-case basis; is that right?

A. That's the way I look at it, depending on the individual case.

Q. Let me ask you: Do you see it [1532] serving a particular purpose in our society? Do you think it accomplishes anything in particular?

A. Yes and no. Sometimes I think it does and sometimes I think it don't. Sometimes you have mixed feelings about things like that.

Q. What do you think it accomplishes when you feel it does?

A. I don't know. It's really hard to say because I know sometimes you feel that it might help to deter crime and then you feel that the person is not really suffering. You're taking the suffering away from him. So it's like I said, sometimes you have mixed feelings about whether or not this is punishment or, you know, you're relieving personal punishment.

Q. In other words, you feel under certain circumstances the death penalty would be bad, but being locked up in a cage would be a whole lot worse and be more punishment; is that what you're saying?

A Yes. In some case you feel like maybe if the person were to suffer in some other way maybe. Maybe I'm not being specific, [1533] but sometimes, you know, you feel maybe this is not really punishing the person to give him the death penalty.

Q. It's over?

A. Yes, it's over and you know, they're not really suffering from it.

Q. Let me ask you this: You're a marred man, aren't you?

A. Yes sir.

Q. Do you know or would you hazarded a guess how your wife feels about the death penalty?

A. No, I don't because we've never really discussed it.

Q It's not something that everyone sits down and hashes out, but sometimes people know or have a feeling. If you had to hazard a guess, if you guessed, what do you think her feelings would be?

A Well, if I had to guess, I would say probably it would depend on the situation.

Q You've got three children, is that right, sir?

A Yes, I have.

Q On of them is grown, though. [1534] Almost all of them are grown, aren't they?

A I have one still in high school.

Q Let's talk a little bit about the procedure in a capital murder case. You understand that under the old laws when a capital murder case was tried, the jury decided in the first part, of course, as they do today, whether the person is guilty or not guilty based on the evidence. If the State proves the indictment to the jury and the jurors has taken an oath to a true verdict render according to the law and according to the evidence, it would mean simply this: If they proved the case to you that the man is guilty, you find him guilty. Can you do that?

A Yes.

Q And if we didn't prove it to you, obviously, if you had a reasonable doubt about one of the accusations, you would find him not guilty. Could you do that ass well?

A. Yes.

Q Just call it the way you see it. That's all that would be expected. How, in the second part of the trial under the old law, the jury might hear more evidence and they might [1535] not. They might just learn about what happened in the offense itself. Under the old law, after you heard all of the evidence, the jurors would decide directly whether a person should receive the death penalty or a life sentence or some number of years. If you someone ought to die for what you heard and the others agreed to its, that's what he got, or life or whatever it was, if the jury unanimously agreed. Could you do that, if you were called upon to do that? Could you make that decision?

A I think I could.

Q Okay. No, that's kind of a trick question because the law doesn't allow you to do that any longer, directly. You don't decide directly whether someone should die or get a life sentence or a number of years. In fact, you can't even consider a number of years. Instead, they give you at the end of the trail—after you've heard all of the evidence, the Judge will give you two or three question to answer based on the evidence and the State has the burden of proof that the questions should be answered yes. If they prove they should

be answered yes, you answer [1536] them yes. Just like you would have to find the man guilty in the first part, you answer the questions yes if we prove that hey should be answered to you in the second part. Any problem with that at all?

A. No.

Q If we don't then you, as a juror, are required to answer the question no. could you do that, as well?

A Yes.

Q Do you understand the effect? All yes answers, that's the same as if you had written in death because the Judge—if you write yes, yes, yes, the Judge will automatically, under the law, assess a sentence of death to the Defendant. He can't say, "No, I don't agree with that. I'll give him a life sentence." You see, it's automatic. You're not writing death, but three yes answers equal death. Make no mistake about it could you do that?

A Yes, I could.

Q All right. The same thing, on of more no answers equals a life sentence. Whether the Judge agrees with you or disagrees [1537] with you, you'll never know anyway because he's not going to say that, what his feelings are. With all due respect t the Court, he's not in a position to tell you whether he agrees or disagrees. Now, you said you could that, as well?

A Yes.

Q All right. Let's look at the three questions. Take whatever time you need to read those, Mr. Warren, and we'll talk to you about them in a little bit more detail.

A (Juror complies.)

Q Any questions about those at all

A No.

Q The first one, I think, is pretty much self—explanatory. It asks you whether the Defendant acted deliberately with the Defendant acted deliberately with the reasonable expectation that the victim would die. You say

you could answer that question yes or no once you hear the facts of the case?

A Yes.

Q If you hear facts that convince you be acted deliberately, if you can hear facts that convince you that be acted with the reasonable expectation that someone would die, [1538] you answer the question yes. If you don't you answer the question no. Any problem with that?

A No.

Q How about number two? What do you think being asked there, Mr. Warren?

A In my opinion, I'm being asked would this person be a threat to society later.

Q The key word there is probability. What do you think that words means to you in that context?

A Maybe a chance or something like this.

Q Is there a chance that the Defendant would commit—it doesn't say a particular offence, does it?

A No.

Q It doesn't say another murder, another capital murder, rape robbery, burglary or an assault. It says criminal acts of violence. That may be self—defining. It may mean what it says it means, an act of violence. Is there a chance he will commit an act of violence, a crime, in the future? Do up necessarily agree with that?

A I suppose there's always that

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[1777] back this afternoon. Folk, thank you again for your patience. See you this week.

(Whereupon, the jury panel and this cause were recessed for lunch, after which the following proceedings were held.)

THE COURT: Well, on the record now that everybody is back including the Defendant, of course. Mr. Nelson, does the State have a question?

MR NELSON: Judge, out position is basically this: at the time of the second shuffle this morning when Mr. West and I went to the central jury room and shuffled, Mr. West had put the cards in the basket and started to pick them out and I said at that point, "Why don't you shuffle them a little bit more. I think we need to shuffle a little bit more." Or something like that. My [1778] recall is that Mr. West's comment at that time was, "Well, just take it up with the Court." That's what I'm attempting to do at this time.

My understanding that a reason for the shuffle is to completely rearrange or randomly select again the array in the seating of the jury. We have—I don't know the exact figures. Some people checked on it before me, but we have a large number of persons who didn't change position at all from the second list to the third list. We have sixteen in a row at one point and at another point ten in a row with only one person in between those groups.

Basically what we're saying is, Judge, that we have sixteen in a row and ten in a row with one in between and then six in a row. Although those things can happen, the State's position is, under the [1779] Latham case, shuffles are to be done in the courtroom unless it is otherwise agreed by the parties. We had that agreement up to the point where I objected to Mr. West's procedure down in central jury room and therefore, we would ask the court to hold that this shuffle was not correctly done and to either reshuffle the panel, the Court itself, or the clerk as directed by the case law and statute in this case or to quash this panel and we will begin with a new panel at the earliest possible time.

MR. CUNNINGHAM: Jim, could I ask you just one question?

MR. NELSON: Sure.

MR CUNNINGHAM: That was a first shuffle; is that correct?

MR. NELSON: That's correct.

MR. CUNNINGHAM: And you went down and shuffled on behalf of the State?

[1780] MR. NELSON: With Mr. West there.

MR. CUNNINGHAM: With Royce standing there?

MR NELSON: Right.

MR. CUNNINGHAM: And he didn't say anything about the way you did whatever you did?

MR. NELSON: No he did not.

MR. CUNNINGHAM: And then you cam back up here. The Jury panel was seated?

MR NELSON: No. The second time they were not seated.

MR. CUNNINGHAM: I'm talking about the first time, We came back up and we looked at the list and then we said we wanted to a shuffle right?

MR. NELSON: Before they were seated again.

MR. CUNNINGHAM: Then you went back down and there was a second shuffle?

MR. NELSON: That's when the [1781] events took place.

MR. CUNNINGHAM: Okay. But the State had received its shuffle?

MR. NELSON: Correct.

MR CUNNINGHAM: Okay. You then had some conversation with Royce and said you were going to take it up with the Court?

MR. NELSON: Well, I suggested that they may need to be shuffled some more and Mr. West say to take it up with the Court.

MR. CUNNINGHAM: Then we came up and went into the Judge's chambers, all four of us were in the Judge's chambers—

MR. WEST: We will waive the oath.

MR. CUNNINGHAM: We will waive it, but everything you said, you're saying as an officer of the court?

[1782] MR. NELSON: Yes, that's correct. If Mr. West disagrees with anything I've said as far as the conversation or anything, then—

MR. CUNNINGHAM: Then all four lawyers, with the Judge, went back into his chambers and you—all were talking about this matter?

MR. NELSON: Correct.

MR. CUNNINGHAM: At that time you did not say, "Judge we object to the manner in which Mr. Royce West shuffled the jury"?

MR. NELSON: That's correct. What was said at that time was, I had some people checking on some things and I wasn't finished checking.

MR. CUNNINGHAM: You did not tell the Judge, "We object and we don't want to go g any further right now"; is that true?

MR. NELSON: No, I didn't use those exact words.

[1783] MR. CUNNINGHAM: Then we came back out and the panel was seated again. The questionnaires were taken up and then the Judge started giving his instructions?

MR. NELSON: Correct.

MR. CUNNINGHAM: He excused sixteen jurors and you did not object to his excusing sixteen, is that correct?

MR. NELSON: The sixteen were excused.

MR. CUNNINGHAM: From the back row only?

MR. NELSON: Yes.

MR. CUNNINGHAM: Then after the Judge's instructions, he told everybody what time he wanted them back all of that and up to the point, you had not told the judge, " we object to this panel and we either want it reshuffled or we want the panel quashed"?

MR. NELSON: No, I had not said those words, but I had told [1784] the Judge that we had—that it might be a problem and that I was investigating it further. I believe the Court will recall that I informed the Court of that before the Court did his general voir dire.

MR. CUNNINGHAM: The week of February 3, the jury panel was seated. The State requested a shuffle. You and Mr. West went downstairs. You shuffled; is that correct?

MR. NELSON: This procedure has been followed.

MR. CUNNINGHAM: The weeks of February 3 and the week of February 11th, the same procedure that we did today?

MR. NELSON: Yes; but without objection from either side.

MR. CUNNINGHAM: In other words, you were familiar with thirty—five, forty, eleven; that [1785] they were supposed to be shuffled down and you did not object the week of February 3 or the week of February 10th and today until after you had gotten your shuffle and Mr. West had gone down and shuffled and then you objected or you said you wre going to take it up with the judge; is that correct?

MR NELSON: I made the comment to Mr. West while the second shuffle was going on. I don't know what words I used, but I indicated a disagreement and Mr. West's comment was

to take it up with the Court and I think that's probably all that was said on that subject.

MR. CUNNINGHAM: An this was supposed to have been the defense's shuffle?

MR. NELSON: It was one done at the defense's request, yes.

MR. CUNNINGHAM: That's all, [1786] Your Honor.

MR. WEST: Your Honor, my recollection of the incident was basically somewhat as Mr. Nelson has represented to the Court. No, I didn't say anything concerning the procedure that was used by Mr. Nelson. I haven't said anything for the past three weeks. I've used basically the same procedure. Now, the State is saying gat this point in time that, from some reason, the defense has done something with the panel in reference to placing them in some particular order.

MR. NELSON: Judge, I never said that. What I'm saying is, we feel that they should have been shuffled more thoroughly than they were.

MR. WEST: Judge, the fact of the matter is, it was the defense's shuffle at that point in time. MR. NELSON could have done [1787] what he wanted to do at the time that he had the right to shuffle and he did that. Then I turned around and did it according to how the defense wanted it done. Now, Mr. Nelson and I talked about it and he had made some mention down in the jury room that I was intentionally doing something and then he backed up off of that. Now, he is bringing it in under the guise as though just because sixteen jurors and one position on the first shuffle are in the same position on the third shuffle that it wasn't done randomly or the shuffle wasn't done correctly.

MR CUNNINGHAM: Your Honor, the point is, what this is really all about is that jurors number one, two, three, four and eight and fifteen on the first list were all black, that when

they went down and shuffled the first time, the black jurors were number [1788] nineteen, twenty-six, thirty-six, thirty-seven, thirty-eight and thirty-nine, that after the second shuffle those some six black are now one, two, three, four, seven and fourteen. That's what this is all about.

MR. NELSON: Judge, I'm going to object to Mr. Cunningham telling the Court what this is about. I voice the State's objections—the Court can tell from the procedure, and I would like the record to reflect, that I voiced my objection to this last array before I knew what it was. I voiced my objection to the shuffling down in the central jury room while it was going on and before I knew what order the jurors would come up here in.

MR WEST: Judge, Mr. Nelson was standing right by me when I shuffled. Now, he cannot dictate the number of times that the [1789] defense puts cards in or takes them out. I didn't try to dictate it at the time that he did it and he can't do it when I don it. Now, the facet of the matter is—and I'm putting it on the record—that for the last three weeks—specifically the week of the 10th we had black jurors on the front that the State immediately did a shuffle. They have a right to do that. The law provides for that. Both sides can shuffle.

Four jurors come up here the week of the 17th and they're black. They shuffle them with the jurors in the same order after his shuffle and they end up on the back row the same order. Now, he's crying about the jurors after the defense does their shuffle that they're back on the first row. They can sit as jurors. If they're qualified as jurors to sit in this particular case, then they [1790] should be able to do it without regards to race.

MR NELSON: Judge, at this point, if the defense wants to have it marked, they can have it marked, but Mr. Shipman prepared a chart of the differences between the second list

and the third list which indicates the very minimal amount of shuffling that resulted this time and that's what I'm saying is, they were not shuffled as thoroughly as they should have been. If the Court would like Mr. Shipman to explain the chart or go over the chart with the Court, he can. I think it will make our position fairly clear.

THE COURT: Well, you—all can put anything that you want to into the record, Mr. Nelson, but I don't believe the Court had any authority at this time to order a reshuffling of the quash this panel based on what I've heard, so I'm [1791] going to go with—

MR. NELSON: But under the Latham case, Judge, the only way the shuffle can be done that way it's been done the last two weeks and today is with the agreement of both parties.

THE COURT: I agree. That's the law.

MR. NELSON: The State has submitted that at the time I objected to Mr. West's procedure that terminated the agreement of both parties. Therefore, that shuffle is void and should be reconducted.

MR. CUNINGHAM: That might be all right except—

MR. WEST: He just said, "Don't you think you should shuffle them some more?

MR. CUNNINGHAM: Secondly, he's already gotten his shuffle. That's basically unfair

MR. MACALUSO: Well, Judge, [1792] if I understood Mr. West; is he saying at the time a particular side requests a shuffle, that side has complete control over the procedure of the shuffle? I need to be corrected on that, so there's no confusion in the future.

THE COURT: There won't be any confusion in the future. Next week; if we have any problems, I'm going to require that it be going to require that it be brought up here to the

Court and the shuffle or whatever it may be be conducted in the presence of the Court, so if either side has an objection at that moment in time, it can voice it to the Court on the record and I can decide whether the shuffle was properly done or not. It won't happen again, I've sat and practiced law in Dallas County for twenty-five years or longer and we've always gone to the central jury room to [1793] do it in the manner in which it was done in this case, so this is not something that has happened every time we have a jury shuffle. I'm sorry it didn't work out in this case.

MR. NELSON: I think my problem is, maybe you objected; but you didn't object promptly enough to cause me to stop the procedure when I could have stopped it and now I do not believe I can order a reshuffle,

MR. NELSON: I thought that I told the Court that we had a problem and there was some question about it and the Court indicated at that point that you anted to go ahead and do the general voir dire anyway for time purposes by other persons checking on the situation. I thought we agreed with that understanding and that's s why we did the general voir dire .

[1794] MR. WEST: Judge when did Mr. Nelson bring this to the Court's attention?

MR. NELSON: When all of us were back there before the general voir dire.

MR. WEST: Well; Judge; it was my understanding that the Court called all the attorneys into the clerk's office and asked if there was some sort of problem and Mr. Nelson said at that point in time, "I shuffled." and turned around and said that I had shuffled, There was no indication that there was a problem at that time.

THE COURT: The problem, Mr. Nelson; is, you didn't—you. Said, as I recall, that you weren't satisfied with the way the shuffle had been conducted or something like, but you

didn't object to the location. That's what you're objecting to [1795] now. I'm going to have to overrule the State's objection on this. Next week it will not be done this way. We'll go with the list that you've got for better or for worse.

Let's bring Mr. Rand in. Mr. Rand, how are you doing?

MR. RAND: Fine; sir.

THE COURT: Mr. Rand: I'll ask you, as much as possible to make yourself comfortable it may not be possible under the circumstances, but if you can lust do that, we would appreciate it, and answer the questions as I know you will, Mr. Macaluso, go ahead.

MR. MACALUSO: Mr. Nelson is going to talk Mr. Rand Judge.

* * * *

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RODERICK R. BOZEMAN,

[273] called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Good morning, Mr. Bozeman. Mr. Bozeman, let me begin by reintroducing everyone here at the counsel table. My name is Paul Macaluso and to my immediate left is Jim Nelson.

MR. NELSON: Good morning.

THE WITNESS: Good morning.

Q You may recall being introduced the other day to Norman Rinne. He was seated over here to—it would have been your far right at the time. The three of us are assistant criminal district attorneys here in Dallas and we work for Henry Wade who, I'm sure you know, is the district attorney. We've been designated as the lawyers who will represent the State of Texas in this particular case.

Now, to Jim's immediate left is Mr. E. Brice Cunningham—

MR. CUNNINGHAM: How are you?

THE WITNESS: Good morning, sir.

Q —and to Mr. Cunningham's immediate left is Mr. Royce West.

MR. WEST: Good morning, sir.

Q You may also recall being introduced to them. They are the defense attorneys who have been appointed by His Honor Judge McDowell to represent the accused Defendant in this case. His name is Thomas Joe Miller-El. He is at your very far right in the powder blue suit.

The reason why I've taken the time to reintroduce you to everyone here is to let you hear our names again. I want to ask you if you recognize any one of us or have heard of any one of us other than common introductions?

A No.

Q Okay. Of course, I also did that to reacquaint you with the roles that we are playing in this particular case.

Now, as you know, at this [275] particular point, Mr. Bozeman, you are a prospective juror in this capital murder case. Mr. Miller-E1 is charged by indictment with the offense of capital murder, the most serious level of offense under the laws of this state. That is, it's serious because of the nature of the offense, of course, capital murder, and it's serious because of the two possible penalties a person can receive if he or she is convicted of this offense.. okay?

As you well know, if a person is .convicted of capital murder, they can receive either only a sentence of death or a sentence of life. Because of that, the law basically allows us to talk to you individually such as we're doing now.

Have you been down here on jury duty before?

A No, I haven't.

Q If you had, and you had been called on in any other case other than a capital murder case, the lawyers would have an opportunity to talk with you and ask you certain questions, but the conversation that you would have with the lawyers would have been [276] conducted while you would be sitting out there in the gallery much as these people are and as much as you were on Monday. The answers you give would be the answers you would give in the presence of forty or fifty virtual strangers. All right?

A Yes.

Q You can see how it might kind of make you a little bit nervous or inhibit you or not relax you as much as we want you to be, so they let us talk to you individually because it's a

little bit more quiet. I imagine, after a period of time, some of these people will—won't be out there and we will be a little more relaxed. Let me invite you to do that, relax as much as you can, and take a deep breath if you're a little bit nervous.

Let me remind you of something that the Judge said earlier. There are no right or wrong answers to any of the things we're going to be talking about. You're not here to please anybody and no one is going to argue with you or quarrel with you about anything or talk you into anything or out of anything. Your feelings, your impressions, and [277] your position, basically, are the things we're going to talk about and are the most important right now. We want to know how Mr. Bozeman thinks. It doesn't matter what we think. We want to know how you think, okay?

A Yes.

Q If you have a question about anything, Mr. Bozeman, by all means ask it because this is the time that you get to do that, all right? If there's a statement you would like to make or something you feel that you need to tell us in fairness to both parties here, then by all means do that, too. will you do that?

A All right.

Q Okay. Let me tell you what our position is right from the outset here. Sir, we are actively seeking the death penalty in this case for Thomas Joe Miller-E1. I want to let you know that from the very outset so you know exactly where we stand and what our position is going to be with regard to the evidence that is presented. We are actively seeking the death penalty in this case and that means that we intend to provide a jury, once [278] it's selected, with both the type and the quality of evidence that will convince them beyond a reasonable doubt that the Defendant is guilty just exactly as he's charged.

Then in the second part of the trial where the punishment is determined, either death or life, we once again intend to be

able to provide this jury with the type and the qualify of evidence that would convince them beyond any reasonable doubt that these questions that make that determination should be answered yes.

You know that three yes answers or all yes answers, that equals an automatic and mandatory sentence of death. Now, that's why I'm just telling you from the very outset, as we're going to tell all the prospective jurors, what our position is so it wouldn't come to you as any surprise if you're actually on the jury.

You understand that, ultimately, it's the jury's decision, not our position or their position, that really counts. Okay?

A Yes.

Q Now, Mr. Bozeman, I know you've been asked this question here on the [279] questionnaire and, as the Judge said, this saves us a great deal of time because otherwise, we would probably have to ask you all these questions and tie you up for much longer than you would want to be tied up. Let me ask you at this point if you would share with us, sir, in your own words, your feelings generally about the death penalty and capital punishment and how you personally feel about it and then, secondly, if you would share with us your feelings about whether you could actually serve on this type of a jury?

A Well, as far as the death penalty is concerned, I think it would, you know, depend on the circumstances involved in what happened, you know, whether I could say I would actually vote for that or not. Yes, I think I could, but, you know, I don't really know at this point. I'm sure I could, but as far .as the death penalty is concerned, I would have to know, you know, the circumstances surrounding it.

Q Let me just ask you, as a general proposition, how do you feel about the death penalty? I understand what you're saying, it would depend on the facts and circumstances, but as a general proposition, how do you view the death penalty,

how do you feel about it? I mean, do you think it serves a purpose in our society? Do you think we ought to have it?

A Yes, it does.

Q What sort of purpose do you feel it serves?

A Well, I think if there's no possible way to rehabilitate a person and he is harmful to society, you know, the State has that right, I feel.

Q You said, if there was no possible way to rehabilitate somebody. Let me ask you: What would be some indication to you, Mr. Bozeman, that someone was beyond rehabilitation?

A Oh, I would say somebody mentally disturbed or something like that or say a Manson type or something like that.

Q Would, for example, repeated criminal violent conduct be some indication to you, sir, that the person was beyond rehabilitation?

A No, not really. It would, I [281] guess, depend on the extent of the crimes that he has committed and if they were, you know, violent crimes over a period of time, different—yes, I believe that it would.

Q In other words, if you see a pattern developing, let's say, in a person's life where he tends to commit violent offenses when released into society, do you feel that is the type of person that you would be able to decide is perhaps not even worthy of or capable of being rehabilitated?

A Yes.

Q Now, let me set out a proposition here. I hesitate to do this because I don't like to pidgeonhole you, but sometimes it serves a purpose. With regard to the death penalty, we've found basically that we could probably categorize people generally speaking in three categories, and in no particular order. Let's say a type of individual who believes in the death penalty and also believes—knows himself well enough to know that they could actually serve on a jury and, if the

situation called for it, could actually make a decision that would result in someone actually receiving the death penalty. They believe in it and they could actually implement it, in other words, on a jury.

Let's say another class of individual, again in no particular order, believes in the death penalty as a proposition, but let's say when it comes to them actually serving on a jury, because of their personality or their temperament or whatever it may be, whatever the fact is, they just don't feel they could actually be the one to do it, could actually make the decision. They agree with it when they read about it in the paper and they agree with the philosophy, let's say, but they couldn't actually serve on the jury.

Let's say there's another class that doesn't believe in the death penalty and could never serve. I gather you' re not in the third category, but do you see yourself in either one of the first two?

A Oh, probably more the second group, I guess.

Q All right. We need to talk about that just a little bit. Mr. Bozeman, let me explain something here so it doesn't sound like [283] I'm rattling on endlessly and covering the same thing repetitiously. When we talk, no matter what we're talking about, and I'm asking you questions and you're answering, you're really talking to everyone here. You're certainly talking to the other lawyers and you're certainly talking to the Judge and, of course, to the court reporter who is taking down everything in this case for appeal purposes, okay, so it's necessary, legalistically speaking, that I ask some things and you'll say, "Why does he keep asking that?" or "Why does he keep going over that? He's repeating himself." or "Haven't I made it clear?" You may well have, but the law simple requires that we go into very tedious and minute detail on some of these things. The lawyers are already tired of hearing me talk and I know the Judge is, but it's really more important that you talk. When I ask you

questions, it's very important that you—I don't know how to put this delicately—not equivocate in your answers. If you can answer something yes or no, that's certainly the best way. Okay? I'm not trying to force you to answer, but do you [284] understand that it is very difficult for the Judge to make certain decisions in regards to a juror's service if someone says, "Well, maybe I could." or "I probably could." or "I possibly could." Do you see what I'm getting at?

A Yes.

Q Now, I'll give you all the time you need to think about any answer that you're going to give, okay?

A All right.

Q I know it's kind of confining, isn't it, but it's just necessary. All right?

A All right.

Q Now, you said that you see yourself fitting more into that second category. Is that because—we've already discussed how you feel about the death penalty. Is it because of your possibly serving or hesitance to serve on the jury itself, or just what is it?

A No. It would be actually the weight of, I guess, thinking about the death penalty and that would be the real thing behind it, I guess. I wouldn't have any problem serving on the jury, I don't think.

[285] Q You think you would have some problem?

A No, I don't think I would.

Q Oh, you don't think you would. Okay. Well, here's the thing. We have to rely—every one here has to rely on every thing you tell us and when you say—again, when you say probably, I know that's probably how—you see, I just said it there. I guess that's how I would answer the question, too, if I had some reservations, but every one here has to rely now on what you're going to do, within the law, of course, and based on the evidence back when you're on the jury. It would be terribly unfair to either or both sides, if some prospective juror said, "Well, maybe I could do this," or

"Maybe I could do that." and then to find out later on that person couldn't do that, you know, under the law, follow the law, when they're actually on the jury. We've got to rely now on what you say. Are you saying that you feel you could?

A Yes, I could.

Q All right. Again, I want you to understand that I'm not trying to talk you into any position, okay?

A No.

Q So you feel that you actually could serve on this type of a jury?

A Yes.

Q And understanding now that in years past with regard to the death penalty—I think you know and it's common knowledge that for many, many years—I say many, many years, ten or fifteen years, maybe more than that—no one was executed, I believe anywhere in the United States for about ten or fifteen years even though death penalties were handed down—

MR. CUNNINGHAM: Your Honor, we'll object to that. What the law was ten or fifteen years ago has no relevance to what we're doing right now.

THE COURT: I'll overrule, Mr. Cunningham. I think you're making a good point, though. Overruled.

Q The point I'm trying to make is, we would expect, as I'm reasonably sure you [287] understand at this point, if a verdict were to result in this case of a sentence of death, a juror should realistically expect now, in 1986, that that sentence would be carried out, whereas years ago, you might have been on a jury and said, "Well, they're not executing anybody. You know, we're getting death penalty cases and hand down a verdict, but no one is being executed." You know, it's kind of like who cares or what's the difference, he's never going to be executed.

Do you understand that you should reasonably expect that, if you were to return a verdict that resulted in the death penalty, Mr. Miller-El, in this case, would be taken to Huntsville, Texas at some point in time and given a lethal injection and executed under the law. I think you understand that, do you not?

A Yes.

Q I mean, the seriousness of the situation?

A Yes, sir.

Q Knowing that, do you feel you still could serve on this type of a case?

A Yes, I could.

[288] Q All right. Now, let's talk a little bit about capital murder. You understand, when we talk about murder, the offense of murder is part of the offense of capital murder. Let me explain that. We have an offense known simply as murder under the laws of this state. Murder is a situation where one person, knowingly or intentionally, causes the death of another individual and that's done without any legal excuse or any legal justification, all right? But not all murders—murder is not a capital offense. You can't receive the death penalty in Texas just for murder. Am I making myself clear, Mr. Bozeman? To be eligible for the death penalty, you must commit murder under a certain set of circumstances or you must murder a particular class of individual. I'm sure you know some of what I'm talking about.

For example, if I murdered—if you murdered me outside in the hall here because we get in an argument, you couldn't receive the death penalty for that or vice versa, if I killed you. All right? Now, if I was a police officer or a fireman in the line [289] of duty, that's a capital murder. Do you see what I'm getting at.

A Yes.

Q —or if you kill a jail guard or kill someone while you're escaping from a penal institution, a jail or penitentiary,

things of that nature. If you kill a number of people in one episode, that's a capital murder. If you kill someone for hire, it's capital murder. if you commit murder also in conjunction with the commission of another very serious felony, such as we've alleged here, murder during a robbery—in other words, murder plus, murder during a burglary, murder during a rape, arson, kidnapping—do you see what I'm getting at?

A Yes.

Q Murder plus. We have to prove both the murder and the aggravated offense, robbery, burglary, rape and so forth. Then murder, which is a first degree felony, is then elevated up the level of a capital offense for which you receive only the death sentence or a life sentence depending on certain factors.

Now, let me ask you: How does that square with your way of thinking, sir, [290] generally of what a death penalty case ought to be, depending upon the facts? Do you think those are the types of offenses that you feel, depending on the facts and circumstances, the Defendant's background, the way the crime was committed—do you feel those are the types of cases that the death penalty ought to be in order for or would you add to that or subtract from it, would you modify it in some way?

A No, I would say yes. Yes, those are the offenses.

Q Okay. Would you add to that? I know you've given it some thought, but do you think you would add something to it? Some people say, "Well, they ought to get the death penalty for sexually abusing little kids.", you know, at least the possible death penalty for it, maybe not in all case, but it ought to be available, or selling dope and getting little kids hooked on heavy dope or beating up and abusing old people and stuff like that.

A I don't believe those should be.

Q Okay. Would you pretty much limit it the way it is?

A Yes, I would.

[291] Q All right. Now, you understand that the trial of a capital murder case is conducted pretty much in the same fashion as any other case, any other criminal case. That is, it's conducted in two parts. The first part deals only with whether the person is guilty or not guilty. The State has the burden of proof. We must convince you beyond a reasonable doubt that the Defendant is guilty, in which case, you find him guilty. If we don't prove that, you find him not guilty. It's as simple as that. If you find him not guilty, the trial is over and everybody goes home. If, on the other hand, you're convinced beyond a reasonable doubt that the Defendant is guilty of capital murder as he's charged here, then we go on with the second part of the trial. You may hear additional evidence to aid you in the second part of the trial and you may not. Either side or both sides can bring you additional evidence, but no one is under any obligation to bring you any additional evidence. You may be in a position where you would decide the answers to the questions, which we'll talk about in a minute, on the [292] basis of the evidence that you received in the first part of the trial because the law does allow you to do that.

Now, the second part of the trial, under the old law, up until about fifteen years ago, I guess it was, or somewhere around there, after the jury heard all the evidence, the jurors would go back and actually directly decide should a person get the death penalty, should they get a life sentence or should they get some number of years. If that's the way you felt and you felt, on the basis of the evidence, that someone ought to die and all the other jurors agreed agreed, you wrote in death or life or some number of years, okay?

Now, that changed about some fifteen years ago—maybe not that long ago. Instead, you don't make that decision directly. You make the decision indirectly on the basis of the

answers to three questions that you're called upon to answer and, you see, the law requires the judge to take an automatic and mandatory course of action. Am I making myself clear?

A [293] Yes.

Q I think the Judge explained this rather adequately the other day, but I just want to go over it again. You understand that it boils down to this: Just as we had the burden of proof in the first part of the trial to convince you that the Defendant is guilty and, if we proved that, you unanimously found the Defendant guilty, the same thing holds true for the second part. We have the burden of convincing you, since we're seeking the death penalty, that those questions should be answered yes. If we do, your oath as a juror will require you to answer the questions yes which you know, three yes answers or all yes answers, means an automatic sentence of death. Judge McDowell has no power under the law to override or change your verdict. You write a letter to him, basically. Three yes answers is automatic death. He can't say, "Well, I disagree with you. I'm going to give him a life sentence."

The same thing would hold true if you answer one or more of the questions no, an automatic life sentence. Whether the Judge agrees or disagrees, it doesn't matter. He [294] will follow that particular order that you give him based on those answers. Okay? Any problem with that procedure?

A No.

Q Okay. Now, let's look at the questions very briefly. Take whatever time you need, Mr. Bowman, to look over those questions and we'll talk about them in just a minute.

A (Juror complies.)

Q Did you get a chance to read all three of them?

A Yes.

Q Did they cause you any problems at all or do you have any questions about any of the three questions?

A No.

Q Do you understand, as I said earlier, that we have to prove those to you. We have to bring you evidence or there has to be evidence presented during the trial that would convince you that those questions should be answered yes beyond a reasonable doubt?

A Right.

Q Is there any reason why you couldn't—allowing that I cannot go into the [295] evidence of this particular case. We're just talking in generalities, sir. Is there any reason why you couldn't answer that first question yes or no depending upon the type of evidence you received, you know, whether someone acted deliberately with the reasonable expectation that the death of somebody would result? Any reason why you couldn't answer that question yes or no?

A No, there's not.

Q Can you see that the type of evidence you would probably need to receive to answer that question would be given to you in the first part of the trial when you learn about how the offense was actually committed and what role the Defendant had?

A Yes.

Q Okay. Question number two, does that cause any problems at all? That kind of looks toward future behavior, doesn't it—

A Yes.

Q All right.—you know, is there a probability that he would commit some criminal acts of violence that would constitute a continuing threat to society. Do you think [296] that question can be answered? Well, let—

A Yes.

Q —me put it this way: You know it can—you think it can?

A Yes.

Q What sort of evidence do you feel would be valuable to you? If you could just tell us, what do you think you would want to know about somebody that would aid you to answer that question yes? What would be the most valuable to you?

A I would probably want to know what he's done in the past and the degree of violence that was involved in those acts.

Q Do you think that would aid you?

A Yes.

Q Do you think, of course—and it's probably reasonable that what you learn about what he did during the actual commission of the crime, actually before the crime in preparation for it, during the crime itself, and then maybe how he reacted afterwards?

A Yes.

Q Do you think that's a pretty good barometer sometimes, how a person reacts after [297] a crime, either remorseful and contrite or are they just kind of nonchalant about it and couldn't careless?

A Yes.

Q Do you think that kind of gives you some insight into what type of person you're dealing with and what—you mention this thing earlier about rehabilitation. You will notice that there is nothing in any of these questions about rehabilitation?

A No, there's not.

Q All right. Do you understand that you're bound, just like we're bound, by these three questions? Do you feel that your personal feelings about rehabilitation would interfere in any way with the answers to those questions or do.. you feel number two maybe looks towards rehabilitation, although it doesn't use that word rehabilitation or rehabilitate?

A I guess it's like you were saying. It would depend on the demeanor of the person, you know, that actually committed the crime, whether he would actually—or there was a chance for him to be rehabilitated or not.

Q All right. You said earlier, if [298] you thought there was a chance that someone could be rehabilitated, you didn't think they should receive the death penalty?

A Right.

Q Let me just ask you—and I don't mean to play word games with you because a lot of times it sounds like that's what we're doing, especially these questions. You see, the Judge can't further define these questions for you. He can't give you any guidelines and neither can I, for that matter.

A Right.

Q He certainly would be in a better position, but he can't. The law does not permit him to do that and the lawyers can't, either.

A Okay.

Q But do you feel your feelings about rehabilitation would in any way conflict with your answering that question, number two?

A No, I don't think they would.

Q Now, number three is a question that may or may not be given to you it depends on whether or not some evidence is raised by any kind of provocation. Can you see [299] how that question could be answered yes or no depending on the type of evidence you receive?

A Yes.

Q Let's shift gears for just a second and let me back up on one thing. Do you remember what I said, years ago in a capital case, the jury was actually expected to express their own opinion as to whether or not somebody should live or die. You know, if you had a particular feeling, as you sat over here and listened to the evidence, he let you voice that, "I think that guy ought to die." or "I think or "I think he ought to get life." or "I think he can be rehabilitated.", whatever the case may be. Do you understand that you can't do that now?

A Yes.

Q The law expects that these three questions be inserted between you and the Defendant in a death sentence or a life

sentence, that you put aside your personal feelings and be rather—I hate to use the word. It may be inappropriate, but—pretty scientific, I guess, just look and see if the proof is there, if it measures up, [300] measures up to an answer beyond a reasonable doubt. If it does, answer the question yes. If it doesn't, you answer the question no, regardless of your personal feelings. Can you see—I'm not saying that this would ever occur, Mr. Bozeman, but can you see how you might be on a jury and you might have a personal desire after you heard the evidence, a personal desire that the person would die or—a personal desire that the person should receive a life sentence? But yet, you see, when it comes time to answer the questions, let's say if you're intellectually honest with regard to answering the questions—let's say you're on a jury and you say, "Well, I think the guy ought, to die after I've heard this. This is horrible. I think the guy ought to die. It scares me, the thought of him being out on the streets again." But then you look at question one or two or three and actually, in all honestly, you say, "Well, as much as I want it done, the proof is just not there in all honesty. I'll have to answer one of those questions no." Could you go ahead and do that knowing it would result in a life sentence and [301] not a death sentence?

A Yes, I could.

Q Let's flip that over. How about in a situation where you're on a jury and you say, "Well, this is a capital murder technically, but I don't think this is the type of capital murder that someone ought to die for." Yet, on the other hand, when all the evidence is in, you see that those three questions, beyond any reasonable doubt, should be answered yes, knowing full well that will result in the execution of somebody who you personally don't desire to be executed—do you see what I'm getting at?

A Yes.

Q Could you go ahead and do that, in all honesty?

A I don't know. I would like to think I could, but I don't think I could. If I didn't feel like he deserved it, I don't think I could go for the death penalty.

Q Okay. We need to pause here for just a second because, obviously, you can see how crucial and critical that is to all of us here. I said, I'm not going to yell at you or [302] quarrel with you or try and talk you into or out of anything. I want to make sure you understand that. I think you're being honest with us and I know you've given it some thought. I just want to be sure. As I said earlier, we're going to have to pin you down on your position. And bearing in mind that I believe you have given it some thought since you were down here on Monday—you have, haven't you?

A Yes.

Q All right. I believe you just told us, that if you were in a situation where you had a personal feeling that a person—you know, we know you're not a robot. We know that, when you sit over here, you're a human being and you're prone to having personal opinions about certain evidence or the desire of a particular situation. Are you saying; that if you, in all honesty, were on a jury, on a hypothetical jury, and you, in your heart, felt that person should not die, yet when you went to answer these three questions, even though, let's say, intellectually there was proof to satisfy you, number one, beyond any [303] reasonable doubt, he acted deliberately and with the reasonable expectation that someone would die, you would have to answer that question yes, and as far as number two, as much as you didn't want to answer that one yes, you would say, "Yeah, I want to be honest about it. I think there's a probability he probably would commit some criminal acts of violence, in which case the law would expect you to answer the question yes, and let's say, in number three, there's no provocation, the poor victim, he didn't do anything to provoke anybody, I'd have to answer that one' yes, yet when it comes down to looking at those three questions and knowing that yes, yes, yes, is the same as writing death, you

understand that the net effect is the same and that's contrary, completely contrary to what you desire, in honestly, Mr. Bozeman, if you're kind of gut—wrenching about it now, as we sit here now, knowing what kind of pressure would be on you—

MR. CUNNINGHAM: Your Honor, we'll object to that last statement. There's no indication and there's no evidence and it's [304] outside the record and it's speculating on whether or not that would be any pressure.

THE COURT: I'll overrule. I'll let Mr. Bozeman make up his mind on that. I think he's answered all the questions I've heard so far very thoughtfully and intelligently, Mr. Bozeman. if any question posed by a lawyer doesn't seem understandable to you, don't hesitate to say so. I'll overrule the objection, Mr. Cunningham.

Q Do you see what I'm getting at? You're not under the same kind of pressure, reasonably, that anyone would understand would be on the situation when you're making a life or death decision back in the jury room with eleven other people. Do you really feel you could put aside your personal feelings or, as you said earlier—you said you didn't think you could?

MR. CUNNINGHAM: Your Honor, we'll object to that last [305] statement. He's gone through those three questions and he said he could answer yes if the facts and circumstances proved beyond a reasonable doubt that the answer should be yes. He said that several different ways.

THE COURT: I'll overrule, Mr. Cunningham. I'll let him answer the questions. You might want to reask it, Mr. Macaluso, to make sure it's clear to Mr. Bozeman. I think he said a moment ago that he might have some problems with it because he would be hesitant about someone receiving the death penalty.

MR. CUNNINGHAM: Your Honor, I would hope that every juror that was sent over there will have some problems with it. The issue is, if he hears the proper facts and circumstances beyond a reasonable doubt, that the answer should be yes to number one, that he would [306] do that. The same thing for number two and the same thing for number three.

THE COURT: I agree. With that statement of law, I'll let Mr. Macaluso reask the question, if he wants to, in case Mr. Bozeman needs to be refreshed.

Q I can barely remember the question. I think it came down to, you said that, if you felt one way, but the proof was another way—

A I'd have to vote with the proof, you know, no matter how I felt. If the answer was yes, then I would have to put yes no matter how I felt about it.

Q Let me shift gears here away from, what we call—we've talked about capital murder and mandatory life or death—and—talk about a situation that I'm not saying would necessarily occur in this case or any other case, for that matter, Mr. Bozeman, but we need to discuss it now because we have the opportunity.

Imagine for a second that you're [307] on a capital murder jury and let's say it's a capital murder that is allegedly a murder during a burglary, let's say, because it's a type of capital murder, or it could be during a rape, I guess. Let's say that you heard all the evidence in the first part of the trial and you and the other jurors were convinced beyond any reasonable doubt that a murder occurred. There's no doubt about it, but you didn't hear any evidence about a burglary or you have a reasonable doubt. You're just not sure about whether that burglary—it was actually murder during a burglary. Do you understand, if that were to occur, you couldn't convict someone of capital murder because the State in that case didn't prove a capital murder to you, did they?

A Right.

Q All they proved was what?

A Was the murder.

Q You got it. In such a situation you find—the Defendant not guilty of capital murder simply because it wasn't proven to you, both parts were not proven to you. You find him guilty of what was proven to you and that's murder, as you've already said. Were that to [308] occur—imagine for a second that you're in a hypothetical situation now where that happened. The range of penalty for murder is altogether different. It's no longer mandatory life or death. Instead, it's the broadest range of punishment provided for under our penal code and our penal system.

Let me just ask you—let me talk a little bit about what murder is. I said earlier that murder is a situation where one person knowingly or intentionally causes the death of another individual. Okay. Let me go on to explain, so we're clear on this and you're clear on this, that that is a situation where this homicide occurs, this killing occurs, without any legal excuse or any legal justification whatsoever. All right? By that I mean, we're not talking about a situation where you believe someone acted in self-defense, whether it's, if I kill Mr. Nelson or you kill me because you think you're in fear of serious bodily injury reasonably or death—and the law gives you the right to kill me. You could be charged with murder, but it wouldn't be murder if the jury believed that [309] you acted in self—defense or I did. Do you see?

A Right.

Q Forget about self—defense when you talk about murder. The same thing would hold true for, if you believed it was an accident. Now, I could kill Mr. Nelson or you could kill somebody. It was an accidental thing. You could be charged with murder, but if the jury believed it was an

accident, it's not murder. A person has to be found not guilty just as he would be if you believed he was acting in self—defense.

The same thing would hold true if you thought someone was insane. As much as people have reservations about the insanity defense, if you—honestly believe or have a reasonable doubt that somebody was insane at the time of a homicide, you can't convict—him of murder.

Lastly, don't be thinking about a situation where someone acts in the heat of sudden passion. As an example, somebody comes home and finds out, God forbid, that their child was sexually abused or something like [310] that happened, something bad, and he picks up a gun and goes into a rage and goes down the street and kills somebody. Do you see what I'm getting at?

A Yes.

Q That's a homicide, but that's a lower grade of homicide. That's not murder, if you believe that, if you're on a jury. Let's divorce our thinking from those sorts of things and let's talk about a situation where one person knowingly or intentionally causes the death of another. I can't give you any other examples. Let me ask you—I gather from what you said, of course, and it's reasonable that anybody would feel this way, that you think murder is a very serious grade of offense.

A Right.

Q Let me ask you: What do you personally feel ought to be the minimum punishment for somebody committing a murder, sir?

MR. CUNNINGHAM: Your Honor, we will object to the form of the question in asking this prospective juror what the minimum [311] punishment is without telling him what the state legislature has set as the minimum punishment, that being five years to ninety-nine or life .

MR. MACALUSO: I intend to do that, judge. I'm just asking the jury what he—

THE COURT: Well, go ahead. I'll overrule the objection. I understand.

Q What do you personally feel ought to be the minimum when somebody commits a murder and it's not self-defense and not an accident and not insanity and not in the heat of sudden passion?

MR. CUNNINGHAM: Your Honor, we would still object to the f o form of the question. It's an improper question, the way he has asked the juror.

THE COURT: I'll overrule, Mr. Cunningham, in this particular situation. I'll overrule and say no more.

[312] A I would say twenty years, I guess.

Q You understand that in a murder case you would be allowed to consider all the facts and circumstances surrounding it, but I want you to understand that you still exclude those four different categories we talked about. Am I making myself clear?

A Yes.

Q Now, Mr. Cunningham is right that the range of penalty is, as I said earlier, very, very broad to encompass a wide variety of situations. As I said earlier, we want to know how Mr. Bozeman feels.

The range of penalty for the offense of murder is, under the law, as low as five years and all the way up to ninety-nine years or life. The law does allow the jury to consider all of the facts and circumstances surrounding the situation where a person murders another person. It boils down to this, Mr. Bozeman, I just want to know what Mr. Bozeman's feelings are and you said that twenty years ought to be the minimum; is that correct?

A Yes.

Q Mr. Bozeman, let me ask you—I [313] can't give you a fact situation, sir, "Well, Mr. Bozeman, what would you do here?" or "What would you do here?" "What if this happened, what would you do here?" That's not proper for us to do that, either side to do that. Are you saying, sir, that you would ever feel, knowing yourself, it would ever be proper under any facts and circumstances where one person murders another person, absent of those other circumstances, to ever give a sentence as low as five years? Do you feel it would ever be proper under any circumstances?

A No, not if it was murder.

Q As I said earlier, Mr. Bozeman, it's not my position, my responsibility, or my desire to talk you into or out of a position and I think it holds true certainly for Mr. Cunningham and Mr. West when they talk to you. As I said from the very outside, we want to know how Mr. Bozeman feels. Let me just make sure we're clear on this. Are you saying that you—and we know you haven't heard any facts surrounding any hypothetical murder and we can't give you any, but are you telling us, telling the Court, telling the Judge, that you [314] do not feel it would ever be proper under any facts and circumstances, whether you can imagine them or not, to ever give as low as five years for a situation where one person knowingly or intentionally causes the death of another, no legal excuse, no legal justification whatsoever, no insanity, no heat of sudden passion, no self-oefense, no accident, you're saying you could never do that?

A Yes, I could, but, like I say, it would depend on the circumstances. Say, the person who was doing the commission of the act, say he panicked and he was trying to, you know, flee the scene and something happened that caused the death, you know, that really it was indirectly. It was his fault, but he didn't do it with malice, then I could say, yes, probably five years could be in order.

Q Bear in mind that we're talking about a knowing or intentional act.

A Oh, no, I don't think so. No.

Q Okay. Well, you see, you said, "I don't think so." Are you saying you could or you could not, sir?

[315] A (No response.)

Q For the knowing or intentional killing of another human being?

MR. CUNNINGHAM: And he believed from the facts and circumstances of that case, that that was a proper verdict, Your Honor.

A Yes.

Q Yes, you could or you could not?

A I could.

Q You could?

A Yes.

Q For a knowing or intentional—

MR. WEST: Your Honor, this is being repetitious. We've gone over it two or three times. He's already answered the question that he could, under the proper facts and circumstances as he deemed them to be, he could give a five year sentence. This is getting to be redundant at this point.

MR. MACALUSO: Judge, I don't mean to be repetitious. I [316] did not quite understand the last response and I just want to clarify it.

MR. WEST: Judge, we can have it read back.

THE COURT: I asked him and you can ask him one more time, Mr. Macaluso.

Q Just so we're clear, are you saying you can, sir, or you cannot?

A Yes, I can.

Q Okay. I am about out of time, Mr. Bozeman, but let me simply ask you: Do you have any questions of us at all at this time?

A No. No, I don't.

Q Sir, do you know of any reason whatsoever, whether I touched on it or not, why you feel you could not be a fair and impartial juror in this type of case?

A No.

Q Any reason that you know of, sir, why you could not sit in judgment of a fellow human being?

A No.

Q Okay. Anything that the Judge [317] covered with you the other day that you have any questions about, in any procedure that is involved in the trial of a case such as this?

A No.

Q Any problems at work or anything like that, family schedule?

A No.

Q You're a happy single man, aren't you?

A Yes.

Q You've been very polite and very kind and open and honest with us, Mr. Bozeman, and I appreciate it. That's all the questions I have for you, sir. I know that Mr. Cunningham and Mr. West will have some questions for you at this time. Thank you, very much, sir.

MR. MACALUSO: I'll pass at this time, Your Honor.

THE COURT: Thank you, Mr. Macaluso.

[318] EXAMINATION

BY MR. CUNNINGHAM:

Q Mr. Bozeman, as the Judge and Mr. Macaluso indicated to you, my name is Brice Cunningham and, along with Mr. West to my immediate left, we represent Mr.' Miller-El in this case. I'd like to ask you just a few questions concerning your questionnaire.

How long have you been at the University of Texas at Dallas?

A I've been there about six months.

Q Where were you employed before that?
A Cam Audio.
Q How long were you with Cam Audio?
A I was with them a year.
Q Are you still attending college?
A No, I'm out right now.
Q That is at Denton, the University of Texas—no, North Texas State University? A Right.
Q Mr. Bozeman, you indicated that you read the Dallas Times Herald; is that correct?
A Yes.
[319] Q Every day?
A Yes.
Q Have you read anything that may purport to be what the facts are in this particular case in the Dallas Times Herald?
A No, I haven't.
Q If you did, you would know that you would have to put that out of your mind, if chosen as a juror on this case, and disregard that because that is some hearsay that reporters are putting in the paper. All the evidence will come from where you're seated there now and in the physical evidence?
A Yes.
Q You could do that if chosen as a juror, sir?
A Yes.
Q The same thing would apply to radio or TV?
A Right.
Q You answered yes to a question that, either you, your spouse or any member of your family or a close friend ever studied law. Who was that, sir?
A I have a cousin in Los Angeles who [320] works for the DA's office.
Q Do you communicate with your cousin in Los Angeles?
A No. I haven't for a few years.
Q Does he try criminal cases or civil cases or do you know?
A I think she's a criminal—

Q Oh, it's a she. Sorry. What is her name?
A Joleen Harkess.
Q When is the last time you saw her?
A Oh, it's been about six or seven years at a family reunion in Longview.
Q And the person that studied sociology is that you?
A Yes.
Q You also answered that you were interested in the outcome of a criminal case in Dallas County. You said yes, talking about T. Cullen Davis. That was just a passing interest as most people were at the time; is that true, sir?
A Yes.
Q And whatever you may have read or heard, either on the TV or the radio or in the [321] papers, you could put that out of your mind and, if you're chosen as a juror on this case, base your decisions totally about the facts and evidence that you hear?
A Yes.

MR. CUNNINGHAM: Pass the juror.

THE COURT: Mr. Bozeman, let me ask you, if you would, sir, to go either in the jury room or the hall. Why don't you wait out in the hallway while we take up a law matter and we'll get you back in just as quickly as we can, one way or the other.

(Whereupon, Mr. Bozeman, left the courtroom, after which the following proceedings were held.)

THE COURT: I thought it might be better to remove the juror in case there's any discussion about what the State did and what the defense did. Mr. Macaluso, the juror has been [322] qualified.

MR. MACALUSO: Yes, sir. We'll exercise a preemptory challenge at this time, Your Honor.

MR. CUNNINGHAM: I want to ask him one other question, Your Honor.

THE COURT: Ask Mr. Bozeman?

MR. CUNNINGHAM: Yes, or the Court can. I just want to put it in the record his race.

THE COURT: The Court will take note of the fact that he is a black male and, according to the juror's sheet, he's twenty—eight years old.

In view of that, Mr. Macaluso, is the State exercising this preemptory for racial reasons or some other reason?

MR. MACALUSO: May the record also reflect that this is the first black that has been questioned by the State and the [323] defense.

THE COURT: Mr. Macaluso, I don't think the law requires the State to state its reason, but I think it is appropriate to ask you if it is for reasons other than his race.

MR. MACALUSO: No. I would state without hesitation or reservation that it is not, Your Honor. Although not required to, I would state at this time that I have reservations and I'm exercising a preemptory challenge in this particular situation because of the general answers of the venireman, Mr. Bozeman, and specifically with regard to his feelings on the death penalty, his feelings and his position with regard to rehabilitative aspects of an individual charged with this sort of crime, his obvious hesitation, which is on the record, with regard to being able [324] to override his personal feelings with regard to somebody receiving a life sentence, and that he also said earlier that he felt the prior pattern of conduct would not necessarily be enough to convince him that a person was worthy or entitled to a death sentence, and other matters.

THE COURT: Let's bring Mr. Bozeman back in, please.

(Whereupon, Mr. Bozeman was returned to the courtroom and the following proceedings were held.)

THE COURT: Mr. Bozeman, come on back in, please, sir, if you would. Mr. Bozeman, you have been excused from service in .this case, but I want to thank you and the lawyers want me to thank you for your attendance and your patience in answering these questions. You've very conscientiously answered the [325] questions and I hope you have good luck in your college career. I hope you get to finish college. It looks like you're working at it. Good luck to you.

(Whereupon, Mr. Bozeman left the courtroom, after which the following proceedings were held.)

MR. NELSON: Judge, during the last voir dire by Mr. Macaluso, Mr. West made an objection with reference to things being redundant or repetitious during voir dire. The Court has placed a time limit on us and it is—our feeling, that as long as we work within that time limit, we can ask things as many times as we want to ask them. I don't think it is a proper objection and we would ask that the defense be instructed not to make that objection again in the presence of a juror.

* * * *

[397] BILLY JEAN FIELDS, called as a jury panel member, having been dull sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Good afternoon, Mr. Fields. Let me begin by reintroducing everyone here so you're acquainted with everyone here at the table. My name is Paul Macaluso and to my immediate left is Mr. Jim Nelson.

MR. NELSON: Hello.

Q Along with Mr. Norman Kinne, who is seated right over here to your far right, as he was introduced yesterday. We are three assistant criminal district attorneys here in Dallas, Mr. Fields. We work for the district attorney, Henry Wade. We've been designated as the lawyers to represent the State of Texas in this particular case.

Now, to Jim's immediate left is Mr. E. Brice Cunningham.

MR. CUNNINGHAM: How are you, Mr. Fields?

[398] Q And to Mr. Cunningham's immediate left is Mr. Royce West.

MR. WEST: Mr. Fields, how are you doing, sir?

Q Both Mr. West and Mr. Cunningham, you may recall, were introduced to you yesterday—not yesterday, Monday I guess it was. I lose track of time. They're the defense attorneys who have been appointed by Judge McDowell to represent the accused Defendant. His name is Thomas Joe Miller-El. Let me ask you if you can see from where you are—you may have to lean forward a little bit. He's in the powder blue suit down there. Can you see him?

A Yes.

Q The reason why I've reintroduced you to everyone here is to let you hear our names once again and to reacquaint you with the roles that we all play in this case and then simply to ask you if you either know or have heard of any one of us other than from the other day when we were introduced?

A Well, since I was here Monday, I heard about the case on the radio.

Q Okay. Could you tell us a little bit about it? What did you hear?

A Well, just a spot announcement that the case was fixing to be heard and it would probably take three weeks to seat the jurors.

Q What radio station was that, if you recall?

A KRLD.

Q Did they go into anything that was purported to be the facts or did they maintain the facts of the offense?

A It was just an announcement.

Q Did they give any information at all over the radio about where it happened or allegedly happened or who was involved? Let me ask you this, sir: Was there anything that you heard on the radio or anywhere else, if you've read anything, for that matter, or talked to anybody, that you feel would influence your decision in this case or keep you from being a fair and impartial juror?

A No.

Q Okay. You could put that aside, whatever you heard?

[400] A Correct.

Q Okay. And even if you couldn't, it wouldn't affect your deliberations; is that correct?

A No.

Q Okay. Mr. Fields, as you well know at this point, you are a prospective juror in this type of case. The law allows us to talk to you individually like we're doing now instead of talking to you in front of all the other people. I believe you've been on a civil case before; haven't you?

A Yes.

Q Did the lawyers talk to you individually during that jury selection?

A No.

Q Typically they will talk to you and you have to answer questions, but you have to do it in the presence of all the other jurors. We've got a little bit of privacy here today and that's the way it is in a death penalty case because we want you to be as relaxed and feel as free to express yourself as you possibly can without having a bunch of—you know, forty or fifty other strangers [401] critiqueing everything you have to

say about some personal things. Let's take advantage of that, if we can. You look like you're pretty relaxed, anyway, but if you aren't, I'd invite you to be.

A I'm relaxed.

Q Sure. Remember that there are no right or wrong answers, sir. No one is going to quiz you about this. No one is grade you on your answers. We dust want to know how you feel and, in some instances, how you feel about certain things. Okay?

A Yes.

Q And if you're just honest with us and tell us how you honestly feel and, if we ask the right questions, then we'll be doing our job and so will you. No one is going to talk you into anything or talk you out of it or try to. I'll guarantee you that. No one. is going to argue with you, quarrel with you, pick at you, criticize you or anything like that. We want to know just honestly how you feel, seat of the pants. If you have a question at any time, whether it is while I'm talking to you or the other lawyers are talking to you, by [402] all means ask the question or make the statement if it's something you need to tell us that we haven't covered, okay?

A Yes.

Q Now, let me tell you what the State's position is in this particular case. You know that the Defendant is charged with capital murder, the,most serious level of offense under the laws of this state. You know that a person who is convicted of capital murder can receive only one of two possible penalties. One is a sentence of death and the other is a sentence of life. There is no in between. It's one or the other.

Now, let me tell you what our position is, that is the position of the lawyers for the State of Texas in this particular case. Mr. Fields, we are actively seeking the death penalty in this particular case for Thomas Joe Miller-E1. The only reason I tell you that is, is to be fair to you and put you on

notice right from the very beginning as to what our posture is and what our position is. That is, we intend to be able to provide a jury, once it's selected—and we only have [403] one juror so far—with both the type and the quality of evidence so to convince them beyond any reasonable doubt whatsoever that Mr. Miller-E1 is guilty exactly as he is charged in this indictment and nothing less.

In the second part of the trial, in the penalty phase of the trial, once again, we intend to provide a jury—that would mean you, of course, if you are on it—with the type and the quality of evidence that would convince them beyond a reasonable doubt that the questions should be answered yes in each instance which, as you know, as the Judge told you the other day, would result in the Judge sentencing the Defendant to be executed. Am I making myself clear?

A Yes.

Q Now, that is our position. Our position really doesn't matter because, o course, ultimately it's the position of the jury and ultimately based on the evidence. I want you to know what we're seeking and we're going about it, okay?

A Yes.

Q Now, do you have any questions to [404] this point, sir?

A No.

Q Okay. Good. With those preliminary remarks out of the way, let me just ask you, Mr. Fields, although you did indicate here on question fifty-six with regard to do you believe in the death penalty—they don't give you a whole lot of room and you don't have a lot of time to think about it or to respond, but would you just tell us, sir, in your own words, just how you feel about the death penalty and capital punishment and your ability to actually serve on a jury of this type and actually render a decision that could result in the death of the Defendant in this particular case?

A Well, I also indicated on there that I was active in a church and, according to the way I personally believe, which may not necessarily be according to my denominational stance, God's word, you know, provides for the State to serve in his behalf. According to the Old Testament, people were killed if they violated His law. In its extended service, the State represents Him if the crime has been [405] committed and death is warranted.

MR. CUNNINGHAM: I'm sorry. I didn't get the last part.

A I said I feel that the State is God's extended person. In other words, the State represents God in today's time.

Therefore, if the State exacts death, then that's what it should be.

Q You said there was some conflict possibly between—you said what the church believes, what your religious beliefs are—

A Well, I said me personally. There are people who are Catholic, Baptist and whatever else, that don't believe in the death penalty. They don't think it's God's will that people should be executed. They think He's a very loving God and He's not one that punishes. I don't believe that way.

Q So you have no philosophical reservations about the death penalty or any religious reservations?

A No.

Q Mr. Fields, do you feel that it serves a particular purpose?

A Does it serve a particular [406] purpose?

Q Do you think the death penalty or the imposition of the death penalty; do you think that serves a purpose?

A Yes.

Q How do you view that?

A Well, I think that, if an individual knows that there is the possibility of death awaiting him or her, maybe they will think twice before they decide to premeditate—

Q In other words, you feel—I'm sorry. I didn't mean to cut you off.

A I just said that they would think twice about what they're going to do.

Q In other words, you feel it may well be a deterrent to other people, to deter them possibly from committing that type of offense?

A Yes.

Q Have you ever felt differently about the death penalty?

A No.

Q You're forty—six. Are you folks alive?

[407] A Yes.

Q Do you know or could you hazard a guess what their position would have been about the death penalty?

A No, I don't know.

Q You're married to Mrs. Fields. Would you know or could you hazard a guess about—

A She feels basically the same way I do.

Q All right. Let me ask you: What sort of offenses do you feel, personally—just picking your own brain and just searching your own soul, what sort of offenses do you feel the death penalty ought to be reserved for?

A Well, the taking of a life, basically—

Q Do you feel strongly about that?

A —but then—well, yes. Now, of course, there are other crimes that fall in the same category and that would be rape and the misuse of an individual by another for his own personal gain where this individual's basic freedoms were hampered.

[408] Q You said it should be reserved, in your opinion, for murder type offenses?

A Murder, rape and slavery, I suppose you could say it that way, if a person's civil rights are being forced out of play.

Q Anything else you can think of?

A Not particularly.

Q The law largely agrees with you in that respect with the exception of the last aspect that you mentioned. The death penalty in Texas, at least, is reserved for murder—type offenses. You mentioned rape. There is one aspect of that that comes into play, a murder offense is made a capital offense. I'll talk to you about that in just a minute. Under the laws of Texas, the only offense for which you can receive the death penalty for, even potentially, is for what we call, as you know, capital murder. First you have the offense of murder. That's just called murder. That's a first degree felony under the laws of this state.

A person commits murder if he knowingly or intentionally causes the death of [409] another human being. That's basically what it is, just murder, and you can't receive the death penalty for it. Am I making myself clear?

A Yes.

Q On the other hand, if you commit murder of a certain class of individual or murder under certain circumstances, the murder itself becomes raised or elevated to a level of capital murder. You can receive the death penalty for capital murder. Do you see what I'm getting at?

A Yes.

Q An example of that is, if you commit murder during a rape or murder during a robbery, murder while you're committing a burglary or arson or kidnapping—do you see—murder plus. Or obviously, as I'm sure you well know, if you murder a police officer or a fireman or a jail guard in the lawful discharge of their duties, then you can receive the potential punishment of the death penalty. If you kill—multiple murders, you know, a string of murders in one situation, or if you hire yourself out. There are other areas, but [410] basically, it's either class of individual or murder during a particular situation. How does that square with your way of thinking of what death penalty case ought to be, you know, given the individual facts and circumstances?

A Okay.

Q As I mentioned earlier in my initial, question, do you have any reservations at all about your ability to actually sit on this type of a jury and render a decision, actually make the decision that could result in the execution .of another human being?

A No.

Q Could you do that?

A Yes.

Q All right. Now, let's talk a little bit about the way that the determination is made. In other words, the Judge talked to you on Monday and told you basically how—a criminal trial is conducted here in this state. The trial itself is conducted in two parts. Let me pause a second. Have you ever been down here on jury duty, other than on the civil case?

A No.

[411] Q Well, criminal trials, all criminal trials, whether it be for the lowest misdemeanor or for a capital offense, they're all conducted in two phases or, two distinct parts. We call them two separate trials. The first part deals only with the guilty or innocence of the person who is charged. That's all. The only determination the jury makes is, the person is guilty beyond a reasonable doubt. In other words, has the State proven that he is guilty, proved all that is in this indictment beyond a reasonable doubt, or have they failed to do so. Before you could actually serve on a jury, whether it be a capital case or otherwise, you take a Sworn oath to a true verdict render according to the law and according to the evidence. It boils down to this, if the State proves that the man is guilty, we've proved all the elements of the offense to you beyond a reasonable doubt, your oath requires that you find the Defendant guilty. Just the same, if we fail to prove all the elements in the indictment, then the jury will be required to find the Defendant not guilty. Any problem with that at all?

[412] A No.

Q If we prove it to you, you could be able to find a Defendant guilty, could you not?

A Yes.

Q If we didn't, you would find him not guilty?

A Right.

Q Okay. If you find him not guilty, the trial is over. If you find him guilty, then we go on to the second part of the trial where the actual punishment is now a consideration. Do you see how they compartmentalize that?

A Yes.

Q Okay. In the second part of the trial,you can hear additional evidence to aid you in making the decision you would be called upon to make. Then again, there is no requirement on either side to offer additional testimony. You see, either side can offer testimony, but neither side has to. Am I making myself clear?

A Right.

Q If you didn't hear any more [413] testimony in the second part of the trial, then you would be called upon to make a decision as to the punishment on the basis of all you learned in the first part of the trial. While the trial is in two parts, you see, in the second part of the trial, you can consider all the evidence you heard up to that point, even in the first part. Do you see what I'm getting at?

A Yes.

Q In other words, you're not limited to what you hear in each section. Now, whether you hear additional testimony or not, at the end of the second phase of the trial, it used to be that juries made a decision direct in a capital case whether a person should live or die or receive a number of years. In other words, if you had a particular feeling about it and after you heard the evidence, you thought the person ought to die and the other eleven people agreed, that's how you voted and that's what it was. If you thought it should have been life and everyone agreed with you, everyone on the jury unanimously agreed, then it's life or some number of years, but you made

[414] the decision on a personal basis. You decided personally how the evidence affected you and what you wanted to vote for.

That changed about thirteen years ago and that particular prerogative has been taken away from the jury. Instead of holding the life or death or a number of years on the basis of your personal feelings, instead you're called upon to answer these three questions. It's on the basis of the answers to the three questions that the law requires the Judge automatically to assess a penalty of death or a sentence of life. Am I making myself clear?

A Yes.

Q Now, you know as well as I do at this point that all the answers that are submitted, you—can receive no more than three—and I'm going to let you look at them in just a second. If all the questions are answered yes, then the law requires and would require—and there's no doubt in mind that Judge McDowell would follow his oath, as a Judge of the courts—the Judge to sentence the Defendant to be executed. He can't override your verdict. He may not necessarily [415] agree with your verdict, but you wouldn't know that. He cannot say, "Well, you answered these questions yes, but I think he should get a life sentence." or "I'm going to give him a life sentence instead of the death sentence." He can't do that. If you answer all three questions yes, the Judge will sentence the Defendant to be executed. It's just the same, if you answer on or more of the questions no, you see, whether he agrees with you or disagrees with you, it doesn't matter. He will assess a sentence of life. Am I making myself clear?

A Yes.

Q All right. Now, you know that the State—has the burden of proof in both parts of the trial. We brought the indictment. We've done the accusing and we must also do the proving. The same thing holds true for the second part of the trial. We're seeking the death penalty. We must provide you

and the other jurors with the type and quality of evidence that convinces you that the questions should be answered yes. If we do, then you answer the questions yes. If we don't, you [416] answer the questions no. Any problem with thatl at all?

A No, sir.

Q Okay. Let's take a look over here on the left. There's a number one, a number two and a number three. Take your time and read those, sir, if you would, please, and we'll talk about them in just a second.

A (Juror complies.)

Q Have you had a chance to look at those?

A Yes.

Q Did they cause you any problem right off the bat, any confusion?

A No.

Q All right. You understand that you would only be called upon to answer these questions, Mr. Fields, assuming —let's just set a hypothetical example here. Let's say you're on a capital murder case and you've heard all of the evidence in the first part of the trial and you and. the other jurors agree that the Defendant is guilty. Let's just assume that imaginary case, okay? You've heard all the evidence in the second part of the [417] trial or you've concluded the second part of the trial, whether there was any additional evidence or not. You're back in the jury room and you're called upon to answer these questions. Now, the first question asks, was the conduct of the Defendant that caused the death of the deceased committed deliberately and with the reasonable expectation that the death of the deceased or another would result. What do you think you're being asked there, Mr. Fields?

A Oh, it's asking—wanting to know if the person who committed the crime did it deliberately, with the premeditated intent to kill.

Q Okay. In other words, you look to the conduct of the individual. I think you can see that probably—you're seeing

the information that you need to answer this question probably when you're learning about the offense itself, how it all happened, what role the Defendant played, and so forth and so on. You decide whether he acted deliberately, was whatever he did, whatever role he played, did he act deliberately. Some people say [418] intentional, but was it deliberate conduct. Did he intend to do it and did he act deliberately. Furthermore, was the act or whatever he did, shooting somebody, knifing somebody, whatever it may have been—and I'm not talking about this case, you understand. I'm just talking about an example, a hypothetical example—was that done with the reasonable expectation that someone was going to die. Can you see how you can answer that question yes or no depending on the facts of the case?

A Yes.

Q Let's go on to number two. What do you think is being asked there, is there a probability that the Defendant will commit criminal acts of violence that would constitute a continuing threat to society?

A Well, this is asking, I think, would the person be classified as a professional criminal or was this just an isolated incident that resulted in the death.

Q What do you think would be the most valuable evidence that you could receive? In other words, if you could say to us, "Mr. [419] Macaluso, this is what I consider the most important. I would like to know this about the individual or know that about the individual", if you wanted to answer that question yes? What can you tell us in that regard? What do you think would be the most valuable thing for you, Mr. Fields, to know about somebody that would enable you to answer that question yes?

A Well, if the individual at the time the crime was committed—if there were individuals who saw what took place or whatever, some type of, you know—an individual or a film or whatever that indicated the person did the crime.

Q Let's just assume that you—understand that you've already found the individual guilty of the offense. Now, you're deciding whether or not there's a probability he would commit future acts of criminal violence. What sort of evidence do you think would aid you, what sort of testimony, what sort of facts, what sort of background, in deciding whether or not this is the type of individual that would probably do something of a criminal nature again?

[420] A Well, typically you would say a history of the person's past actions, but I would think also possibly hearing that individual himself talk to me.

Q Well, you understand—let me just back up a second. You understand that in a criminal trial, no matter what kind of criminal trial, be it capital murder or shoplifting, any person charged with a crime has a right not to testify?

A Yes.

Q Although I have no way of knowing, in any case, whether a Defendant will testify or not, let's assume that the Defendant does not for these purposes. Do you understand that... if the Defendant wants to testify, he can and, if he doesn't want to, no one can make him? Do you understand that, also?

A Yes.

Q If he chooses not to testify, that's fine. That's a right that we all have. You cannot consider that as any evidence of his guilty whatsoever. Do you understand that?

A Right.

Q You can't hold that against him in [421] either part of the trial?

A Right.

Q So it may well be, during the trial, that you may not hear from the Defendant, do you understand that, so wouldn't have that information to assist you. Let me ask you this, Mr. Fields; Do you think you could learn enough about an individual when you learn about the crime itself for which he's on trial, when you learn the dynamics of the crime, the

very spastics of the crime? In other words, what lead up to the crime, what planning was involved, what role did a Defendant had in that planning, if any, what alternatives he could have taken, did he have to commit this crime. I mean, was it necessary or, you know, any stretch of the imagination, doing the commission of the offense itself? Did he have to do this? Did he have to do that? How violent and vicious was it? What role did he play in it? Was he subservient or was he. active in calling the shots, so to speak? Do you see what I'm getting at?

A Yes.

[422] Q What alternatives did he have? What about afterwards, how did he react? Did he show remorse and contrition or was he nonchalant, was he blase, did he care, you know, was it another day at the office, was he the type of person that it was just like swatting a fly? Do you see what I'm getting at?

A Yes.

Q Do you think you could learn enough about an individual when you learn all of those facets of his involvement in a very serious capital murder to tell you to answer that question, yes, there's a probability he would commit some criminal acts of violence in the future? Do you think you could do that?

A Right.

Q I'm not trying to—I just want to know how you feel about it. Don't go along with me. If you don't think so, fine. Do you think you could?

A Yes.

Q You said, also, that you would like to know about his background?

A Right.

[423] Q All right. Other criminal acts and so forth?

A Yes.

Q Let me just ask you briefly: What does that word probability mean to you in that connotation?

A Well, it means is there a possibility that he will continue to lead this type of life, will he ,be rehabilitated or does he intend to make this a life—long ambition.

Q Let me ask you, Mr. Fields, do you feel as though some people simply cannot be rehabilitated?

A No.

Q You think everyone can be rehabilitated?

A Yes.

Q I'm just curious. How would you ever know that there is somebody that—well, you said something earlier, but I can't remember exactly what it was, about whether or not somebody could be rehabilitated in conjunction with one of my questions earlier. You said that would tell you whether or not somebody could possibly be rehabilitated?

[424] A Well, I think you're talking about the fact of whether or not it was premeditated. It may be far—fetched, but I feel like, if a person has the opportunity to really be talked about God and he commits himself, whereas he has committed this offense, then if he turns his life around, that is rehabilitation. I know the State has a program that is supposed to work, but ālso it has a relatively bad record. I feel like when an individual has really been truly reached by someone reading the word of God to him and they are repentant and they do have a real act of contrition, they can be rehabilitated and that's been demonstrated.

Q Let me ask you this, sir—and I don't mean to quarrel with you. I want you to understand that. These questions are very important to all of us and your impressions of these questions. As I said earlier, you're not saying anything right and you're not saying anything wrong. You're just being honest with us. You notice that there is nothing in these questions that directly verbatim addresses rehabilitation. The word is not used there. [425] Of course, I can't tell you what these questions mean. Do you understand that? That's for you to decide. Let me ask you this hypothetically: Do you feel that if somebody, as you just said earlier, if the Defendant—

and we're not talking about Mr. Miller-E1. We're just talking about an imaginary Defendant—were to get on the witness stand and indicate to you that he is repentant and has had this religious experience or conversion or exposure, at least, if you were to believe him, do you feel that you could ever answer these questions yes regardless of the evidence at that point? Could you ever allow this person to ever be executed?

A Yes.

Q I'm just curious. Bow would that square with your feelings about rehabilitation?

A Well, now based on what you said as far as the crime goes, there are only two things that could be rendered, death or life in prison. If for some reason the testimony didn't warrant death, then life imprisonment would give an individual an opportunity to rehabilitate. But, you know, you said that the [426] jurors didn't have the opportunity to make a personal decision in the matter with reference to what I thought or felt, but it was just based on the questions according to the way the law has been handed down.

Q Let's shift gears away from capital murder and let's talk about a situation that I'm not suggesting occurred in this particular case, but it something I have to approach with you at this point because we have the opportunity. Let's imagine again that you're on a jury, a capital murder case. Let's say it's a murder alleged to have been committed during a rape. That's a type of capital murder. Let's 'say you were convinced, along with the other jurors and you don't have any doubt whatsoever that the Defendant committed the murder, but let's say you don't hear any testimony about any rape or you have a reasonable doubt that it occurred during the commission of a rape, you understand that if we expect you to convict.somebody of capital murder, we have to prove both the murder and the rape. Am I making myself clear?

A Yes.

[427] Q We haven't done that, have we?

A No.

Q Not in that example. What you do in a situation like that, you have to, under your oath, find that Defendant not guilty of capital murder simply because we didn't prove capital murder. Do you see? What did we prove?

A You proved rape.

Q No, we didn't prove rape at all. We proved murder.

A Well, one or the other.

Q Right. There's no testimony on rape, but there is testimony on murder and you're convinced it was a murder, so you find him guilty of murder. It wouldn't be capital murder and if it's not capital murder, it's not mandatory life or death. Do you see what I'm getting at?

A Yes.

Q In that situation, you would be called upon to assess a penalty for the offense of murder, not capital murder, but just regular murder and you can't receive the death penalty for regular murder. Now, so we're clear on [428] this and I want to be brief about this, but I need to cover this with you. When we talk about murder, we're talking about a situation where one person knowingly or intentionally or both, knowingly and intentionally, causes the death of another individual without any legal excuse and without any legal justification at all. So when you talk about murder, I want to divorce from your mind, if we can, a homicide, you see, where you have somebody who was acting in self-defense. In other words, when you talk about the range of punishment for murder, we're not talking about a range of penalty for a situation where you believe someone killed somebody else, but they did it in self-defense because, if you believe that someone acted in self-defense—for example, if I felt that Mr. Nelson was going to kill me or you felt that way about me, you have the right to protect yourself all the way to the point of using deadly force to kill me. See, you could be charged with murder or I could be charged with murder, but if the jury believed that I acted in self—defense, they would have to find me not guilty. Do you see what I'm getting at?

[429] A Yes.

Q It's not like you're giving a lower penalty. Huh-uh. You have to find the Defendant not guilty. Do you see what I'm getting at?

A Yes.

Q So when we're talking about murder, forget about someone that kills in self-defense. All right? The same thing holds true if you believe it was an accident. It may look like murder and somebody could be charged with murder, but if you believed honestly or had a reasonable doubt that it was an accident, the gun went off accidentally or something like that, you don't give them a low punishment. You find them not guilty. So don't be thinking about accidents, either, all right, or 'insanity. A lot of people are skeptical about insanity defenses these days for whatever reasons, but if you believed someone was insane at the time he killed somebody, you would have to find them not guilty, so don't be thinking about that. The same thing holds true if you believe it was a crime of passion. That's a situation—as an example, if someone comes [430] home and finds out that their child has been sexually molested by a neighbor and the neighbor is up the street laughing about it and you go into a rage basically, adequate cause, you take a gun and you kill the neighbor. The law doesn't excuse that, but it doesn't make it murder, either. If you were on a jury and you believed that the person killed with that kind of sudden passion, that sort of influence, you would not convict him of murder. You would convict him of voluntary manslaughter, so that's not murder. Do you see what I'm getting at?

A Yes.

Q The reason I'm making that point is, I want to make sure you understand as clear as I can present it what murder is. Now, the penalty range for murder is as broad as it is for any offense under the laws of this state. Okay. Let me ask you—I know you said earlier that you felt obviously strong about murder being, obviously, a very serious offense.

THE COURT: One moment, please. Is this a juror?

[431] MR. MACALUSO: Thank you, sir.

Q Mr. Fields, if you had the power, what do you think the minimum penalty ought to be for a murder as I've described it? In other words, I can't give you facts and situations like this type of murder or that type of murder, but excluding those things that we did discuss, excluding self-defense, excluding insanity, excluding accident, excluding any crime of passion or an emotional type thing.

A Are you saying that all of those you just named and described earlier—say types of violence that have a premeditated reason; is that what you're saying—

Q No.

A —and murder without a premeditated reason—

.Q No. What I'm saying is, if one person knowingly or intentionally kills another and there is no legal excuse or justification. Those four things I gave you are legal excuses or justification. You see?

A Okay.

Q In other words, a person knowingly [432] or intentionally kills another person and it wasn't in self—defense because that's not murder and it wasn't insanity and it wasn't an accident and it wasn't a crime of passion.

A Well, based on what I told you earlier, death would be the result.

Q All right. Now, that's your s that personal feeling correct?

A Yes.

Q Now, let me explain, but it's not to argue with you or quarrel with I'm not going to do that. The range of under the laws of Texas for the offense not less than five years nor more years or life, depending upon still bear in mind excluding those four things I described to you. I gather from what you—re saying—or just tell me in your own words, could you ever, would you ever, think, sir, that a five year

sentence would ever be proper under any facts and circumstances for the offense of murder where one person knowingly or intentionally causes the death of another person, no self—[433] defense, no accident, no insanity, no crime of passion?

A Now, you asked me could I—you want to know what do I thank the minimum penalty would be in a case of murder?

Q Right. What I actually want to know is, would you ever, knowing yourself, feel that five years would be enough, that the minimum punishment, five years—could you ever assess a penalty for five years in a murder case regardless of the facts or circumstances? As long as there is a murder, could you ever give as low as five years?

MR. CUNNINGHAM: And he felt that was the proper punishment based upon the law and the evidence that he had heard, Your Honor.

A Are you meaning personally or based on how the law sets this out?

Q Well, I guess a combination of both.

A Well, I was asking him, was he meaning how did I feel about it personally or how did I feel about it in regards to how the [434] law says it is.

Q Well, the law sets out—you see, we want to know how you feel.

A Well, it would be fine.

Q You say you could give five years?

A I'm saying I could give five years.

Q And if you felt it was proper, if the facts and circumstances called for ninetynine years or life?

A I could give that.

Q Let me ask you this, sir: Do you know of any reason why you couldn't sit in judgment of another human being in a case of this type?

A No, sir.

Q The law says that a conviction can be had—that is, the jury can base a conviction on the testimony of one eyewitness to a crime. That's what the law says. You can understand how frequently there may be only one eyewitness to a crime, a lady is raped or someone has had their purse taken from them, whatever the case may be. There may be one survivor to whatever offense it is. The law [435] says that, whether it be capital murder or shoplifting or rape or purse snatching, if the jury believes that one eyewitness beyond a reasonable doubt—in other words, they believe that person can recognize the individual and testify to all the elements of the indictment, the jury can base a conviction on that and nothing else. How do you personally feel about it? Could you base a conviction in a capital murder where the death penalty is a potential on the testimony of one eyewitness if you believed the eyewitness beyond a reasonable doubt?

A Yes.

Q I'm just going through the questionnaire here. You said your brother it says, "Have you, your spouse, or close friend or relative, ever been charged, arrested, indicted, or convicted of any criminal offense?" and you said something about your brother?

A Right.

Q Could you tell me a little bit about that?

A He was arrested and convicted on [436] number of occasions for possession of a controlled substance.

Q Was that here in Dallas?

A Yes.

Q Was he involved in any trials or anything like that?

A I suppose of sorts. I don't really know too much about it.

Q Was he ever convicted?

A Yeah, he served time.

Q Do you feel that that would in any way interfere with your service on this jury at all?

A No.

Q Mr. Fields, you've been very polite and very kind and very open with us and I appreciate that. Let me just ask you, sir, whether I touched on it or not, is there any reason that you know of why you could not—be fair and impartial to both sides?

A No.

Q Do you have any questions of me at all?

A No.

MR. MACALUSO: Thank you [437] very much. Your Honor, I'll pass the juror. Mr. Fields, Mr. Cunningham and Mr. West will have some questions for you.

THE COURT: Go ahead, Mr. Cunningham.

[438] EXAMINATION

BY MR. CUNNINGHAM:

Q Mr. Fields, as you have been advised, Mr. West and myself represent Thomas Joe Miller-El in this case where he is charged with the offense of capital murder. Very briefly I'd like to ask you some questions with reference to the questionnaire and possibly concerning some of the law.

First of all, what age man are you, sir?

A As of yesterday, I'm forty-seven.

Q Happy belated birthday. How long have you lived in Dallas County?

A About twenty-five years, twentyfour years. I came here in '62.

Q What is your race?

A I'm really colored.

Q Okay. Are you married, single or what is your marital status?

A I'm married and I have four children.

Q Does your wife work?

A No, she doesn't.

Q Where do you work?

[439] A I work for the U.S. Postal Service.

Q That's here in Dallas?

A Yes.

Q How long have you worked for the postal service?

A Eighteen years.

Q Do you have any children?

A Yes, four.

Q What do they do?

A They're all students from a senior in high school down to the third grade.

Q You attend St. Monica Catholic Church?

A Yes.

Q Is that an integrated church? A Yes.

Q What racial mixture would you say it was? You know, how many—

A Oh, I would say the majority there are white or caucasian and then the next majority would be Latin American or Mexican American and then your people from the far east or middle east Indian, Vietnamese.

Q In other words—your church is [440] located where, in North Dallas?

A It's at the corner of Walnut Hill Lane and Midway Road.

Q How long have you been a member of St. Monica Catholic Church?

A For ten years.

Q Do you teach Sunday school or hold an office or anything?

A Well, in the Catholic church you don't have Sunday school as it's set up in the protestant church. I'm a member of the Holy Name Society and that's a men's organization and it's basically devised or set up to assist the pastor as he needs and to promote the belief of Christ.

Q How long have you been a member of the Holy Name Society?

A For the last seven years. Now, in conjunction with that, as far as teaching goes, not within that parish, but at large within the Catholic church, there is what we call the charismatic renewal and I have taught there.

Q How long have you taught in the charismatic movement within the Catholic church?

[441] A Eleven years.

Q I notice that you attend this church more than once a week?

A Well, between the movement and the church, yes, and meetings, and we have holy days of obligation which requires you to attend more than once a week.

Q You've indicated that you are a member or a financial supporter of a media church. What church is that, sir?

A St. Monica.

Q St. Monica?

A Oh, I'm sorry, the media church. Yes, sir. The 700 Club on—which is—

Q How long—have you been a contributor to the 700 Club?

A About five years.

Q You indicated that you have heard something on the radio, I believe—was it the radio?

A Yes.

Q You understand that that is not evidence in this case?

A Right.

Q And you could not consider that as [442] evidence?

A Right.

Q Well, like I said, yes, I can do it, but it didn't go into any detail. It just said that this was coming up and it would probably take three weeks to seat jurors and that's where the thing ended.

Q You also understand that, if you heard something—if you were chosen as a member of this jury and you heard something on the radio or saw something on TV or read it in the papers, you could not consider that as any evidence whatsoever?

A Right.

Q How long have you had the bumper sticker on the back of your car?

A Eleven years.

Q And that bumper sticker says what?

A It says, "Jesus Renews the Hearts of Men"—or "Jesus Renews Hearts" in big letters and then "(the Hearts of Men) " in parentheses.

Q You indicated that you had received a ticket once and you felt that it [443] wasn't deserved?

A Right.

Q The fact that you received this ticket would not affect your decision if chosen as a juror in this case, sir?

A No.

Q You indicated that either a friend or—member of your immediate family or a closer friend was a victim of a crime. Is that "mugging"?

A Yes.

Q Was it someone in your family?

A No, a friend.

Q. Wash anyone ever caught or anything?

A It just recently happened, so no one has been caught.

Q The fact that you hae a friend that was mugged would not affect your decision, if you're chosen as as juror, in this case?

A No.

Q You would be fair to both sides?

A Yes.

Q Mr. Macaluso asked you about your brother. Whatever happened to your brother, [444] that would not affect your decision, if chosen as a juror, in this case, sir?

A No.

Q If you were chosen as a juror in this case, would you base your decisions only upon the evidence that you heard and the facts of that case, sir?

A Yes.

Q Let the chips fall where they may?

A Yes.

Q Do you know of any other reason why you could not be a fair and impartial juror, sir?

A No.

Q I'm going to add one word onto that. Do you know of any other reason why you could not be a fair and impartial juror other than your race, negro or color black?

A No.

MR. CUNNINGHAM: Pass the juror, Your Honor.

MR. NELSON: Judge, may we approach the bench?

THE COURT: Surely. Mr. Fields, let me ask you to go out [445] in the hallway while we have a law matter to take up here and, in that way, we can just do it without the lawyers having to come around.

(Whereupon, Mr. Fields left the courtroom, after which the following proceedings were held.)

MR. NELSON: We have an indication, Judge, that this juror has what they denominate as an annual leave coming up in the next couple of weeks and we thought that was a situation that the Court ought to check into before a decision is made as to the qualification of this juror.

THE COURT: Well, I can go into—go ahead, Mr. Cunningham.

MR. CUNNINGHAM: Your Honor, we would object. Mr. Macaluso talked with this prospective juror thirty minutes or more. I think one of his questions was whether [446] or not there was any reason why he could not be a fair and impartial

juror. I asked him the same thing. If he thought that his coming vacation would affect his sitting as a juror, the State could have inquired. If he had thought—and I would suggest from the answers we have received from Mr. Fields—it would affect his decision as a juror, he would have told us.

THE COURT: The only concern the Court has is, if he is accepted—I don't know what is' going to happen, obviously. I would need to ask him, frankly, before I swore him, if there was any reason why he couldn't come back and serve in a month, say. I have had that happen.

MR. MACALUSO: I might add, Your Honor, that I have had this occur a number of times and I think we all have. I'm not trying [447] to play word games here, but I did overlook asking that question and I.think the question, as Mr. Cunningham mentioned a moment ago, did address it, was there any reason why you couldn't be fair and impartial and not whether there is anything that would impede your service on this jury. I have had in the past and I know the Court is aware of situations that have occurred where we neglected to ask that question only to have it come up later on.

THE COURT: Well, Mr. Cunningham and Mr. West, how about the Court inquiring of him just in that area? I don't know where this information comes from.

MR. CUNNINGHAM: Your Honor, on behalf of the accused, Thomas Joe Miller-El, Jr., I would object to even the State, the defense, or the Court inquiring of the juror whether or not the fact that he [448] has a vacation coming up in one week, two weeks—and it looks like it's getting even longer in this case—and would suggest that under Article 35.11 that all the State can do now is decide whether or not it wants to accept or reject this juror.

THE COURT: Mr. Nelson, Mr. Macaluso, I agree with the defense on that. I probably would still like to inquire if he is accepted.

MR. CUNNINGHAM: And then he would have to make other arrangements. It's just that simple.

THE COURT: That would be my position, unfortunately. I'm going to hold the juror qualified at this point, Mr. Macaluso and Mr. Nelson, and ask you—all to tell me whether you wish to accept or swear the juror?

MR. MACALUSO: We'll exercise—reluctantly exercise [449] a preemptory challenge, Your Honor. I want to ask the Court, does the Court intend to make an inquiry?

THE COURT: Of him, or just in the future of all jurors?

MR. MACALUSO: Of him.

THE COURT: If you wish, I will, yes, just for information purposes.

MR. MACALUSO: I understand. I can envision a situation, because I've seen it before, where it comes back to haunt us somewhere down the line.

THE COURT: I had that happen in the last case you and I did and we spent about three hours on the juror and found out in the last five minutes that he had some—I think in the future what I will do, when I'm doing my little preamble there, is just tell the person—remind them again what the potential schedule of this case is and ask them if [450] there is any reason they would be unable to do that. If they indicate there would be, I'll let the lawyers start pursuing it.

MR. WEST: Before we bring the juror back in, may the record reflect that is the second black that's been called by the Court for voir dire purposes.

THE COURT: The record may so reflect. I might add—go ahead, Mr. Nelson.

MR. NELSON: Your Honor, with reference to that, the State would like to offer into the record the fact that we're certainly not exercising a preemptory strike on Mr. Fields

because of his race in this case, but we do have concern with reference to some of his statements as to the death penalty in that he said that he could only give death if he thought a person could not be rehabilitated and he [451] later made the comment tnat any person could be rehabilitated if they find God or are introduced to God and the fact that we have a concern that his religious feelings may affect his jury service in this case. Those are our reasons for exercising our preemptory strike at this time.

MR. CUNNINGHAM: Your Honor, we would object—we would say, the defense would say, that the reason just given by the State for their exercise of their second preemptory challenge is a farce and that this juror was explicit both on his questionnaire and in answer to Mr. Macaluso about in the proper case and under the proper facts and circumstances that he could and would give the death penalty. He also expressed the fact that he was a deeply religious man and that is shown by his questionnaire and by the [452] information I elucidated from him and that there is nothing wrong with the fact of a person believing that every individual can be rehabilitated and that in no way conflicts with his belief that in the proper case and under the proper facts and circumstances, he could render a verdict answering the three questions, that are required by 37.071, yes if the evidence showed that and, Your Honor, there is no conflict and there was no conflict and the State had an opportunity to go into as much detail as it wanted to develop whether or not there was a conflict and, after all the examination by the State, there was no conflict shown.

Your Honor, for the purposes of the record, we would also—we want to offer the questionnaire that was filled out by Mr. Fields as an exhibit in this case, both [453] the one that the State had and the one that the defense has.

THE COURT: Well, the Court has one, too. I'll admit it—I'll give the State a chance to object to it. I'm sorry. I'm being a little presumptuous.

MR. NELSON: Excuse me, Judge. It's just for record purposes?

THE COURT: Right. I'm assuming it's just for record purposes?

MR. CUNNINGHAM: Yes.

THE COURT: I would offer to either side—I was going to say, if you—all wanted to, for appellate purposes, let the record reflect some of his answers on the questionnaire having to do with whatever, the number of children, that you could offer the questionnaire because it was given under oath. The juror was sworn prior to the time he filled this

* * * *

[455] Fields' questionnaires?

THE COURT: Yes.

MR. MACALUSO: The Court is going to admit, for record purposes, Mr. Bozeman and Mr. Fields?

MR. WEST: And Mr. Fields.

MR. MACALUSO: I have no objection to that.

MR. WEST: Excuse me, Mr. Nelson—

THE COURT: Go ahead, Mr. Nelson.

MR. NELSON: I just wanted to make sure the record is clear that I said we would like to call attention to the fact that his brother has been convicted of a felony prior to this, also, which is another consideration to the State's decision.

MR. CUNNINGHAM: Your Honor, there is no evidence that he was convicted of a felony.

MR. NELSON: All right. He [456] says he's been convicted of an offense and did time. The record will speak for itself on that, also.

MR. CUNNINGHAM: I think that, if he had been convicted of a felony, then he would have been disqualified—

MR. NELSON: His brother. His brother.

MR. CUNNINGHAM: I'm talking about his brother. That's the one you said was convicted of a felony?

MR. NELSON: Right.

MR. CUNNINGHAM: If he was convicted of a felony of possession of a controlled substance, then he would not be qualified and he never would have gotten up here and have been on this jury.

MR. NELSON: His brother.

MR. CUNNINGHAM: I'm talking about his brother.

[457] MR. NELSON: The fact that his brother was convicted doesn't disqualify him, as a matter of law, Brice.

MR. CUNNINGHAM: Oh, okay. Excuse me.

THE COURT: Let's bring Mr. Fields back in.

(Whereupon, Mr. Fields returned to the courtroom and the following proceedings were held.)

THE COURT: Mr. Fields, just come back up here in front of the bench, sir, if you would. Sir, you've been excused from any service in this case and I want to tell you that we appreciate your attendance and your patience with us and your very candid answers to the questions. When you're excused, you can give your badge to the bailiff. A question came up in my mind, because of your job, that you might have some [458] vacation coming. Would that have interfered with your service in this case?

MR. FIELDS: I'm on vacation this week.

THE COURT: You're on vacation right now?

MR. FIELDS: We have jury duty time.

THE COURT: So you get credit. You don't get docked?

MR. FIELDS: No.

THE COURT: You don't get docked for serving on a jury and you still get your vacation?

MR. FIELDS: Right.

THE COURT: Off the record.

(Whereupon, there was an off-the-record discussion, after which the following proceedings were held.)

THE COURT: This is number ten. Mr. Riddle, first of all, I apologize to you for the delay. We've got people scheduled here

* * * *

[1519] JOE A. WARREN, called as a Jurv, panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth and nothing but the truth, was examined and testified as follows.

EXAMINATION

BY MR. MACALUSO:

Q Thank you, Your Honor; and good afternoon, Mr. Warren. Mr. Warren, let me begin by reintroducing everyone to you. I'm Paul ETacaluso. This is Jim Nelson.

MR. NELSON: Good afternoon.

Q When the trial begins, we will be joined by MOrman Kinne. Mr. Kinne, along with the rest of us here, are assistant criminal district attorneys here is Dallas. We work for Henry Wade who, I'm sure you know, is the district attorney for

Dallas and Mr. Wade has designated us to represent the State of Texas. Mr. Kinne, to our surprise, contracte the Chicken Pox. He's about fifty years old, so we're kind of ribbing him about it. I guess it's not really funny that he came down with it because he's got Chicken Pox and we'll porbably join him in the next couple of weeks.

[1520] To Jim's immediate left is Mr. Brice Cunningham.

MR. CUNNINGHAH: How are you, Mr. Warren?

MR. WARREN: Fine, sir.

Q To Mr. Cunningham's immediate left is Mr. Royce West.

MR. WEST: Mr. Warren, good. afternoon.

Q You may recall that they are the defense attorneys who have been appointed by His Honor; judge McDowell to represent the Defendant who is charged with capital murder. His name is Thomas Joe Miller-El. He's in the powder blue suit and you may be able to see him form where you're sitting. He's charged with capital murder.

The reason I've taken time to, reintroduce everyone—here is to reacquaint you with the roles we play; who we are and what we do, and simply to ask you if you recognize any one of us, Mr. Warren, other than from the other day?

A No. I've probably seen each of you.
Q Gooing down the halls of something like that?
A Yes.
Q You don't know anything about this case, do you?
A Not that I can recall.
Q As you well know, Mr. Warren, are a prospective i uror in this case We have two jurors, but one is kind of iffy because they may have a medical problem. Basically we have two Jurors, but we need ten more before we can start. We've

talked to—you're the twenty-eighth person that has been assigned to service in this case and we only have twojurors; so you can see how laborious and time-consuming this is.

Now, the whole purpose of this process we're going through is to ultimately try to find the twelve people that both sides feel are best suited and best qualified for this type of very serious case. You know the Defendant is charged with capital murder. That's the most serious level of all crimes under the laws of this state it's obviously serious because of the nature of the offense.

* * * *

[1527] he went ahead and killed anyway is that right?
A Yes.
Q I gather you feel very strongly about human life, I gather, in that regard?
A Sure.
Q We're talking abou't murder?
A Yes.
Q What sort of crimes, if you can think of any—and if you can't, that's fine, but just let me know. What sort of crimes do you feel it would not be warranted? You said some cases yes and some cases no. Are you saying, if he didn't have a choice, you don't think the death penalty is warranted?
A I would say in some cases; if you were—in self-defense sometimes, then I would say no.
Q Let me talk a little bit about murder and capital murder. First off, you can only receiver the death penalty in Texas for the offense of capital murder. It's a very, very special type of murder. Years ago you could get the death penalty for rape and you could get the death penalty for armed robbert and some other offenses, I think. But under the [1528] law that is in effect in Texas today, the only offense that can receive or potentially receive the death penalty for is a capital murder.

Capital murder starts off basically with what we know as the offense of murder. I'll call it regular murder even though the law doesn't agree with that. It just calls it murder. Murder is a situation where one person knowingly or intentionally causes the death of another individual without any legal excuse or any legal justification. Murder, as I've describe it is not a capital offense. It is not an offense for which a person, under the law of Texas, can receive the death penalty.

For example, if I knowingly and intentionally cause the death of Mr. Nelson without any legal excuse or justification, that may be murder. Unless it's committed under certain circumstances or Mr. Nelson is a particular class of individual like a fireman or a police officer, then all it is—I shouldn't say all it is because it's obviously very serious. It is not capital murder. Am I making myself clear?

[1529] A Yes

Q All right. You can't receive the death penalty for that type of a murder. On the other hand, if you commit murder, knowingly or intentionally causing the death of somebody, and you murder somebody who is a policeman or a fireman or jail guard, and those people are acting in the lawful discharge of their duties—their on the job, I other words—and they're killed, then murder is elevated, raised up to the level of capital murder and you can receive potentially the death penalty for that. Do you see what I'm getting at?

A Yes.

Q Some other types of capital murder would be murder of a bunch of people, man murders. That's new under the law. Do you remember when there were six or seven people in killed in a bar about two years ago?

A Yes.

Q That could be capital murder under the law. Or if you kill somebody for hire, if I hired Mr. Nelson to kill Mr. Cunningham, I could be tried for capital murder for hiring

him and he could be tried for doing [1530] the actual killing. Both of us could get the death penalty for hiring yourself out as a killer. Or, as we've alleged here in the indictment, if you commit murder while you're either attempting to commit or are actually committing another felony offense. If you murder while you're robbing them, if you murder somebody while you're burglarizing somebody's home, if you murder somebody by arson or you kidnap somebody that you murder. Do you see what I'm getting at?

A Yes, sir.

Q We call that murder plus. Right off it's a murder plus another very serious felony offense. How do you feel about this? Do you fell those are the types of cases, generally speaking, where you feel the death penalty would be appropriate, depending on the facts and circumstances?

A Well, there again, I would say it depends on the case and the circumstances involved at the time.

Q Okay. But depending upon those things that you mentioned earlier, do you feel, for example, a murder during a robbery where a [1531] person had a choice to kill or not to kill? Do you see? Do you fell that would be the type of case that you feel the death penalty would be warranted in?

A I think if you had a choice, you know.

Q Now, let me ask you: Have you ever felt differently about the death penalty at all? Have you ever felt it wasn't the thing to do or it wasn't—we didn't need it or we shouldn't have it?

A Well, there again, it goes back to the situation, you know, sometimes.

Q You know, some people have just a general disapproval of the death penalty. I know some people go down to Austin to lobby against it and have it repealed. You never were like that, I guess?

A No, I've never—you know, just as far as generally speaking, I've never.

Q You fell it's proper on a case-by-case basis; is that right?

A That's the way I look at it, depending on the individual case.

Q Let me ask you: Do you see it [1532] serving a particular purpose in our society? Do you thing it accomplishes anything in particular?

A Yes and no. Sometimes I think it does and sometimes I think it don't. Sometimes you have mixed feelings about things like that.

Q What do you think it accomplishes when you feel it does?

A I don't know. It's really hard to say because I know sometimes you feel that it might help to deter crime and then you feel that the person is not really suffering. You're taking the suffering away from him. So it's like I said, sometimes you have mixed feelings about whether or not this is punishment of, you know, you're relieving personal punishment.

Q In other words, you feel under certain circumstances the death penalty would be bad, but being locked up in a cage would be a whole lot worse and be more punishment; is that what you're saying?

A Yes. In some cases you feel like maybe if the person were to suffer in some other way maybe. Maybe I'm not being specific, [1533] but sometimes, you know, you feel maybe this is not really punishing the person to give him the death penalty.

Q It's over?

A Yes, it's over and, you know, they're not really suffering from it.

Q Let me ask you this: You're a married man, aren't you?

A Yes, sir.

Q Do you know or would you hazard a guess how your wife feels about the death penalty?

A No, I don't because we've never really discussed it.

Q It's not something that everyone sits down and hashes out, but sometimes people know or have feelings. If you had to hazard a guess, if you guessed, what do you thing her feelings would be?

A Well, it I had to guess, I would say probably it would depend on the situation.

Q You've got three children; is that right, sir?

A Yes, I have.

Q On of them is grown, though. [1534] Almost all of them are grown, aren't they?

A I have one still in high school.

Q Let's talk a little bit about the procedure in a capital murder case. You understand that under the old laws when a capital murder case was tried, the jury decided in the first part, of course, as they do today, whether the person is guilty or not guilty based on the evidence. If the State proves the indictment to the jury and the jurors has taken an oath to a true verdict render according to the law a according to the evidence, it would mean simply this: If they proved the case to you that the man is guilty, you find him guilty. Can you do that?

A Yes.

Q And if we didn't prove it to you, obviously, if you had a reasonable doubt about one of the accusation, you would find him guilty. Could you do that as well?

A Yes.

Q Just call it the way you see it. That's all that would be expected. How, in the second part of the trial under the old law, the jury hear more evidence and they might [1535] not. They might must learn about what happened in the offense itself. Under the old law, after you heard all of the evidence, the jurors would decided directly whether a person should receive the death penalty of a life sentence of some number of years. If you someone ought to die or for what you heard and the others agreed to it, that's what he got, or the others agreed

to it, that's what he got, or life or whatever it was, if the jury unanimously agreed. Could you do that, it you were called upon to do that? Could you make that decision?

A I think I could.

Q Okay. Now, that's kind of a trick question because the law doesn't allow you to decide directly whether someone should die of get a life sentence or a number of years. In fact, you can't even consider a number of years. Instead, the give you at the end of the trial—after you've heard all of the evidence, the Judge will give you two or three questions to answer based on the evidence and the State has the burden of proof that the questions should be answered yes. If they proved they should be answered yes, you answer [1536] them yes. Just like you would have to find the man guilty in the first part, you answer the questions yes if we prove that they should be answered to you in the second part. Any problem with at all?

A No.

Q If we don't then you, as a juror, are required to answer the question no, could you do that as well?

A Yes.

Q Do you understand the effect? All yes answers, that's the same as if you had written in death because the Judge—if you write yes, yes, yes, the Judge will automatically, under the law, assess a sentence of death to the Defendant. He can't say, "No, I don't agree with that. I'll give him a life sentence." You see, it's automatic. You're not writing death, but three year answers equal death. Make no mistake about it. Could you do that?

A Yes, I could.

Q All right, The same thing, one or more no answers equals a life sentence. Whether Judge agrees with you or disagrees [1537] with you, you'll never know anyway because he's not going to say that, what his feelings are.

With all due respect to the Court, he's not in the position to tell you whether he agrees or disagrees. Now, you said you could that, as well?

A Yes.

Q All right. Let's look at the three questions. Take whatever time you need to read those, Mr. Warren, and we'll talk to you about them in a little bit more detail.

A (Juror complies.)

Q Any questions about those at all?

A No.

Q The first one, I think, is pretty much self-explanatory. It asks you whether the Defendant acted deliberately with the reasonable expectation that the victim would die. You say you could answer that question yes or no once you hear the facts of the case?

A Yes.

Q If you hear facts that convince you he acted deliberately, if you hear facts that convince you that he acted with reasonable expectation that someone would die, [1538] you answer the question yes. If you don't you answer the question no. Any problem with that?

A No.

Q How about number two? What do you think is being asked there, Mr. Warren?

A In my opinion, I'm being asked would this person be a threat to society later.

Q The key word there is probability. What do you think that words means to you in that context.

A Maybe a chance or something like this.

Q Is there a chance that the Defendant would commit—it doesn't say a particular offence, does it?

A No.

Q It doesn't say another murder, another capital murder, rape robbery, burglary or an assault. It says criminal acts of violence. That may be self-defining. It may mean what it says it means, an act of violence. Is there a chance he will

commit an act of violence, a crime, in the future? Do up necessarily agree with that?

A I suppose there's always that [1539] chance, but there again, you never know.

Q Well, do you think that question can be answered yes or no? Would you be able to answer that question yes or no depending upon the evidence you hear?

A Based on the evidence, I would answer it accordingly.

Q Let me ask you this, Mr. Warren: Could you share with us what you feel would be the most valuable to you to permit you to answer that question yes? What would you want to know about somebody to decide whether or not this is the type of person, you know, that you would feel good about answering the question yes, "Yeah, I think there is a chance that his guy is going to commit some criminal act of violence in the future."? What would you want to know about?

A What would I want to know?

Q Yes. I'm putting you on the spot, aren't I?

A That's really hard to say, as far as being specific, What I would like to know. I guess probably I would have to know some of the background of the person, maybe something [1540] that happened in the past or something like this.

Q Criminal background, had he done something like this before?

A Something like this in the past, you know.

Q That he's done some other violent acts in the past?

A Yes.

Q Let me ask you: Do you think you could learn enough when you learn about what he did during the offense itself? For example, you learn about the crime itself, the capital murder itself, what he did, for example, before, during and after, like did he plan it, did he participate in the planning, pick out the victim, the location. How about the crime itself, did he actively participate in it or was he the get-away driver? Do you see? Was he a leader or was he a follower? Was he

calling the shots or just standing by? Did he have—like you said earlier, did have to do what he did? Was it necessary that he kill this individual? Do you see what I'm getting at?

[1541] A Yes.

Q Okay. Then afterwards, you decide whether or not—how did he react to the whole thing? After killing this individual, if he did, was he feeling bad about it , crying, unhappy about it, or was he nonchalant, was he blaze, another day at the office, he just didn't care. If you learn all about the offense itself do you think you could learn enough about a person if you learn all about what he did before, during and after a crime, would it satisfy you that, "Yeah, there's a chance that this guy will probably do something like this again given the chance"? Do you think you could do that?

A Sure, there's a possibility.

Q The last question just asks basically whether or not it was an offense that involves some provocation. In other words, did the victim do or say something to provoke the Defendant into killing him. If you decide that he didn't do anything, then you answer the question yes, it was an unprovoked death. If you decide he did or said something, then you decide whether or not the Defendant acted [1542] reasonably or unreasonably in killing him. Do you see what I'm getting at?

A Yes.

Q Let's shift gears for just a second, Mr. Warren, and talk about what we started talking about initially and that's the offense of murder. Let me make sure you understand what murder is and what a murder is not, okay?

A Yes.

Q Because you mentioned something earlier about self—defense. Let me talk to you about the offense of murder. Let me set the ground work. You could be on a capital murder jury. Just imagine for it for a second. We're not talking about this case or anything like that, just another case, imaginary case. Let's say it was a murder during a

burglary. Let's suppose for just a minute that you hear evidence that satisfies you and convinces you beyond a doubt that the Defendant murdered this individual, but let's say you didn't hear any evidence about a burglary. Do you see? If we want to convict the Defendant of capital murder, we have to prove both the murder and [1543] the burglary. Do you see what I'm getting at? We didn't do that, though, did we? We only proved the murder, so you can't find the Defendant guilty of capital murder if we didn't prove the burglary. You found him not guilty of capital murder and found him guilty of murder, which is what we did prove. Am I making myself clear?

A Are you saying , if you proved the murder and not the burglary, it's not capital murder?

Q That's exactly what I'm saying. In order for that to happen—let's say that happened. Then the only thing about automatic life or automatic death—remember, as I said earlier, you can't get the death penalty or an automatic lift sentence just for murder, Do you understand that?

A Yes.

Q Okay. I gather you feel pretty strongly about murder, do you not? I mean, goes with out saying?

A Well, it's just like I said, you know. There are cases, I mean, personally, that I feel I wouldn't want to personally be, [1544] you know, involved with it if I had a choice, but as far as the case, you know, if I feel that you can avoid it, you know, I think you should.

Q All right. So let's talk—you said earlier that one of the biggest factors in your decision would be whether or not a person, like you said, had to do it or had another choice: is that correct?

A Yes.

Q Okay. Now, when we talk about murder, we talk about a situation where on person knowingly and/or intentionally causes the death or another human being without any legal excuse or any legal justification. Let's talk about

what a legal excuse or legal justification is. On of them was mentioned earlier. It's self—defense. You, me, Mr. Nelson and everyone here has the right to kill somebody, if it's necessary, in self-defense. If we don that, even though we might be charged with murder—if you were charged with murder and I was on the jury and I believed that you acted in self-defense, I would have to find you not guilty. It's not that I would give you a [1545] low punishment, but if I understood and believed that you acted in self-defense, I would have to find you not guilty. You would have to find me not guilty, if things were switched around. Do you see what I'm getting at?

A Yes.

Q So when you're thinking about the punishment for murder, the range of punishment for murder under the law—and we'll talk about that in a second—don't be thinking about self-defense because if you think somebody killed in self—defense, then you have to find them not guilty. They're not guilty of murder, so don't by thinking about self-defense.

Another justification would be, or another situation is, if you kill somebody accidentally. Even though you've been charged with murder, if I believe that you killed somebody accidentally, the gun went off by accident, the gun or a knife, whatever the case may be, I would have to find you not guilty. It's not like you say, "Let's give him some light punishment or give him probation or [1546] something like that." It's not guilty because that's not murder. If you believe that I was insane, even though you might not like the insanity defense because a lot of people don't, if you honestly believe that I was insane when I dilled somebody, it's not murder, Do you see what I'm getting at?

A Yes.

Q The same thing holds true, let's say, for a crime of passion, something that we all can understand. For example, you're a parent and let say, God forbid, something should

happen to one of our daughters. She's sexually molested, for example. You come home and you find out that the neighbor up the street is the one who did it and he's laughing about it and you go berserk, you know. You pick up a gun or a knife and you go up the street and you kill him. Do you see? That's not murder, either. If you believe that I did that, for example, because of what reaction I had to what this guy had done to my daughter, that's not murder. That's voluntary manslaughter. Do you see what I'm getting at?

A Yes.

[1547] Q It's not murder. I want you to divorce your thinking from accident, insanity, self-defense or a crime of passion or even a reckless act where I shouldn't have bee doing something because murder is a knowing and intentional act. I knew, when I killed Mr. Nelson, what I was doing and I intended to do it. Do you see what I'm getting at?

A Yes.

Q Now, the reason I mention that is this: The law—as I said, there is a completely different range of penalties for the offense of murder. I don't want to be thinking about these other things where you might say that you would give a guy a break if it happened—if I though he was insane or if I thought it happened in self-defense, any of those cases. You don't do that. You find them not guilty. What we're talking about, we're talking about murder, "I knew it." I intended to dot it." "I killed somebody." There is no legal excuse of justification.

Let me ask you: What do you personally feel ought to be the penalty? What do you think ought to be the minimum penalty [1548] for someone who knowingly and intends to kill somebody? What do you personally feel should be the minimum penalty for that sort of conduct?

A Are you speaking without any provocation or anything, just—

Q Right.

MR. CUNNINGHAM: You Honor, we would object to without any provocation because provocation is not an element of the offense of murder.

MR. MACALUSO: I'll rephrase it, Your Honor.

THE COURT: Go ahead.

Q When we say provocation, we mean something where I would be acting in self-defense if he provoked me. I'm talking about limiting it, so don't be thinking self-defense, insanity, accident or a crime of passion, in the heat of passion. What do you think the minimum ought to be.

A Well, if I have to just give you a flat answer without knowing the case itself—

Q Well I cannot give you a fact [1549] situation and I'm not asking you what would you do if this happened and what would you do if this happened, what would you do if that happened. Lt me ask you this: The range of penalty for murder is from five years in the Texas Department of Corrections all the way to ninety-nine years or life an up to a $10,000.00 fine. The law simple says, to be a qualified juror, if you can in all honesty, you have to set the punishment somewhere within there. If not, like you said earlier—in all honesty, if you cannot, if you don't think you could set a punishment within that range, then you need to let us know. In other words, if you saw a case that involved a murder—and I don't have time to go back and review those categories, but a murder where one person knows he's going to kill this individual and kills him—what do you feel would ever be proper , under any facts and circumstances, to your way of thinking, to ever assess a penalty as low as five years in the penitentiary for knowing and intentional killing?

MR. CUNNINGHAM: If he [1550] thought that was the proper punishment

MR. MACALUSO: Excuse me, Judge.

MR. CUNNINGHAM: Your Honor, if he felt that that was a proper punishment in that case.

THE COURT: Did you qualify it like that?

MR. MACALUSO: I believe I did. I think I said what he thought was proper based on the facts.

Q In other words, could you ever vote for five years?
A I would try to make my decision based on the case and the evidence at the time?
Q Are you saying that you could?
A I could, based in the evidence that was given at the time, yeah.

Q All right. By the same token, I gather then, if you heard fact and circumstances that called for a sentence of ninety-nine years, if you felt that was the proper thing to do after you heard the [1551] evidence, you could do that?
A Yes, if—I would make my decision after I heard the evidence. I wouldn't make the decision in advance.
Q Let me ask you this, sir, in closing here: If you had the choice of having the death penalty in Texas or not having the death penalty in Texas, how would you feel? Would you have one or not have one?
A Well, you mean just a flat yes or no on the death penalty?
Q Yes.
A Well, I probably wouldn't vote yes or no because there are cases where I don believe it probably would be proper, but there are other cases where I don't, so—
Q What I'm saying is, if you could tailor certain fact situations, do you feet that we should have the death penalty for certain type of cases?
A In certain types of cases, I do.
Q Mr. Warren, I've done most of the talking here a given you time to respond, but let me ask you: Do you have any questions of us, at all?

[1552] A Not at this time.
Q Do you know of any reason, sir, whether I've touched on it or not, why you couldn't be a fain and impartial juror to both sides?
A None whatsoever.
Q Is there any reason why you couldn't answer all three of those questions yes, id we proved that they should be answered yes, knowing that it would result in this man's execution?
A No.
Q I appreciate your honesty, Mr. Warren, with us. Mr. Cunningham and Mr. West will have some questions for you now.

MR. MACALUSO: I'll pass the witness—juror, rather.

THE COURT: Thank you. Mr. Cunningham.

[1553] EXAMINATION

BY MR. CUNNINGHAM:

Q Mr. Warren, as you have been advised, my name is Brice Cunningham and, along with Mr. West to my left, we represent Mr. Thomas Joe Miller—El in this case where he stands charged with the offense of capital murder. Very briefly, I would like to ask you some questions concerning the questionnaire and possible some questions that may have been propounded to you by Mr. Macaluso.

This first question may sound like it is asinine or a question that is obvious on the face, but there are some things that we have to get at indirectly. What is your race?

A Black.
Q I notice that you live at 4123 Telstar?
A Yes.
Q How long have you live there, sir?
A I've been there about eleven years now.
Q Are you buying your home or renting your home?

[1554] A Buying.
Q You work at Kroger's as a market manager?
A Yes.
Q How long have you been with the Kroger stores?
A About twenty—one years.
Q How long have you been market manager?
A About nineteen and a half.
Q Does your wife work outside of the home?
A Yes, she does.
Q In what capacity?
A She's an operator. She operates a bagging machine.
Q How long has she been employed?
A About twenty years.
Q You're a member of Salem Baptist Church?
A Yes.
Q How long have you been a member of Salem Baptist Church?
A About twenty years.
Q Your two sons, are they in high [1555] school?
A One of them is, the youngest.
Q Where is the oldest?
A My oldest, he's at home, but he goes to a college here in town and works at night.
Q Which one?
A Mountainview.
Q What year is he in at Mountainview?
A He's in his second semester.
Q How long were you in the army?
A About three months.
Q You're a member of Local 540 Union, meatcutters' union?
A Yes, I am.
Q Have you held any offices in the union?
A No.
Q Is your brother still on the police force in New Jersey?
A No, he's not.

Q How long was he on the police force in New Jersey?
A I'm not sure. He was up there, [1556] after he got out of the service, for about twelve years. I don't now exactly how long he was on the force.
Q This mishap that you son was involved in, was that Bengy or Joe, Jr.
A That was Joe, Jr.
Q Did anything happen as a result of that that might affect your decision if chosen as a juror in this case, sir?
A No.
Q That was something at school?
A Yes, it was.
Q You indicate that sometimes you see certain cases on TV and you're interested in it. You understand that anything you may have seen on TV would have no bearing whatsoever on any issues in this case?
A Yes, I do.
Q And you could put that out of your mind?
A Yes, I could.
Q Was your brother-in-law a victim of a crime in Las Vegas?
A My brother, Yes.
Q Okay. What type of crime was it?
[1557] A I don't know the details of it, sir. He had to make restitution of some money. It involved some food stamps or something, but I don't know all the details of it. He was convicted and got a probated sentence. He had to make restitution of some money.
Q How long ago was that, sir?
A That was about a year and a half or two ago.
Q How long have you been a member of Crime Stoppers?
A Well, the reason is, we have it in the neighborhood, you know where we have is it called Crime Stoppers or Crime Watchers where, you know, you watch neighbors' homes? That may be Crime Watch, cut it's the neighborhood

service thing where the neighbors watch each other's homes. That's what I'm speaking of. When Chief Dyson was here, we were also involved in the other program that he had that was similar to that. I can't recall the specific name of it, though. It was similar to that . They would have little meetings in the schools and PTAs and stuff like that. It was king of a neighborhood thing is [1558] what it was.

Q What part of the city if Telstar located in?

A It's in Oak cliff off of Westmoreland.

Q Do you now of any reason, Mr. Warren, why you could no be a fair and impartial juror if chosen in this case?

A None whatsoever.

MR. CUNNINGHAM: Pass the juror, Your Honor.

MR. MACALUSO: May we have just a moment, Your Honor?

THE COURT: Surely. Mr. Warren, let me ask you to wait out in the had for just a moment, please.

(Whereupon, Mr. Warren left the courtroom, after which the following proceedings were held.)

MR. MACALUSO: We will exercise a preemptory challenge.

THE COURT: Okay. Well, I'll—

[1559] MR. WEST: I didn't hear you. Excuse me, what was that, Judge?

MR. MACALUSO: I said we will exercise a preemptory challenge.

THE COURT: Of course, I'll note that.

(Whereupon , Mr. Warren returned to the courtroom and the following proceedings were held.)

THE COURT: Mr. Warren, I'm going to excuse you form service in this case, which means you will be free to leave

here and go about your business. I want to add to what I said earlier and thank you for your patience primarily with us and the system. You were down here Monday practically all day and you're sown here late this afternoon. I note from some of these lawyers questions that they felt a great deal of respect for [1560] you, because I do, for your answers. You're the kind of juror to me, at least, that makes the whole system work. It's people like yourself who are willing to put up with the hassle of the system to do your duties a citizen. I wish you could serve as a juror one some cases, but evidently this is not the case. So you will be excused to go about your business. Thanks a whole lot.

MR. MACALUSO: Thank you, Mr. Warren.

MR. CUNNIGHAM: Thank you.

THE COURT: That takes care of twenty-eight.

MR. MACALUSO: Twenty-nine.

MR. NELSON: Thirty.

MR. MACALUSO: Thirty-one and Thirty-two.

(Whereupon, these proceeding are continued in Volume IV.)

* * * *

[1796] EDWIN L. RAND, called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. NELSON:

Q Mr. Rand, I'm sorry. We're having a little trouble getting organized this afternoon it seems to get going. I'm sorry to make you sit up there or a minute. I want to kind of reintroduce everybody. You heard us in front of the whole group earlier this morning. To begin, my name is Jim

Nelson. Sitting next to me is Mr. Paul Macaluso. The third person that will be involved for the State of Texas is a gentleman by the name of Norman Kinne. Mr. Kinne is about fifty years old and is home with the Chicken Pox and has been for a couple of weeks, Having had them as a child, I can sympathize with him. I certainly wouldn't want to have them at fifty years old, but that's what he's dealing with. The three of us are assistant district attorneys and it will be our responsibility to [1797] handle this case for the State of Texas, We've been assigned to handle it by Henry Wade, your elected district attorney. Immediately to my left is Mr. E. Brice Cunningham.

MR. CUNNINGHAM: How are you, Mr. Rand?

Q And to his left is Mr. Royce West.

MR. WEST: Mr. Rand, good afternoon.

Q These two gentlemen have been appointed by Judge McDowell to defend Thomas Joe Miler-El. He's the man at the far end of the counsel table from me. You may be able to see him or you may not from your position there. Mr. Miller-El is charged with the offense of capital murder. That is the most serious offense in the State of Texas. Because of that—have you been on jury service before, Mr. Rand?

A No, I haven't.

Q Normally in jury service, you would be seated out in the gallery with the entire group, kind of like you were this morning, and question would be asked and some things would be discussed out there in front of [1798] the entire group rather than one on one or one on five like we're doing it here. The hope is that because these issues are so serious an people have very strong feelings one way or the other on what's involved in this case, by you being in here individually, you will be able to feel that you can talk more openly and hopefully be a little bit more relaxed, at least as you can be while you're up on the witness stand and we're

out here. The big thing that we would like you to do is relax and remember, Mr. Rand, that here are no right or wrong answers to anything any of us are going to ask you today. We're just trying to find out how you feel. No one is going to argue with you or try to change your mind about anything, but we feel like you need to know what you're dealing with and what's going to happen and, of course, we need to know how you feel about some things, so we can get the twelve people best suited to serve in this jury sitting in those twelve chairs over there.

Now, we've talked to—you're the thirty-seventh person we've talked to in this trial and we have two jurors at this point, so [1799] you can see it's a rather tedious process and things take a while. Not everyone is suited to serve on this particular kind on case. With that rather lengthy introduction, that's why we're talking to you individually and, if you will just be as open and honest as you can be with all of us, Mr. Cunningham, Mr. West and the Judge, who will be listening at the same time I'm talking to you, if you will be as candid as you can be, then that will help us what we need to do an find out whether you're the kind of person suited to serve on this king of jury or not, okay?

A Okay.

Q Now, Mr. Rand, I fell like you have a right to know what our position is right now. Our position doesn't really count and your does, but I want you to know where we're coming from. The State of Texas is actively seeking the death penalty for Thomas Joe Miller-El, that man sitting right down there. We feel like we could present to twelve jurors the type and the quantity of evidence that will convince them to find him guilty of capital murder and the type and quantity of evidence [1800] that will convince the jury beyond a reasonable doubt to answer those three questions yes that result in the death penalty. Judge McDowell has no options. If those three questions are answered yes by the jury, he must

assess the death penalty, period, no ifs, ands, or buts about it. If one of those questions is answered no, he must assess a life sentence. Again, he has no options, so its up to the jury what's going to happen in this case.

Now, with that—I know you had a chance this morning to fill out a questionnaire, but you didn't have a whole lot of time and we wee shuffling in and out of the courtroom while you where trying to do it. Maybe over lunch you had a little but more time to think about it , but would you tell us just briefly how you feel about the death penalty?

A That's kind of a touchy subject. In my own opinion, I think it could be enforced depending upon the crime itself, the circumstances of why someone was killed or could it have been avoided, that type of situation.

Q Okay. Have you given it any [1801] thought before today, Mr. Rand?

A No, not serious thought.

Q I understand that you haven't had a whole lot of time to think about it today, since you just found out three or so hours ago what the situation was?

A I think I've always pretty much had that same attitude toward it, though.

Q That was going to be my next question, how long you have felt the way that you do now. You're now married, are you, Mr. Rand?

A No, sir.

Q Did you grow up here in Dallas?

A Yes, I did.

Q Are your parents here?

A Yes.

Q Would you venture a guess as to how your parents might feel about the death penalty?

A No, I couldn't because we haven't talked about it.

Q You—all haven't discussed it at all?

A No.

[1802] Q Okay. Do you have any brothers and sisters?

A Yes, one of each.

Q What about them, do you have any idea how they feel about the death penalty?

A No.

Q Okay. Well, you say you've felt this way for a period of time. Let me just tell you briefly, the death penalty in Texas only applies to , what we call, capital murder and that is murder in a specific situation or a specific set of circumstances; one, the killing of a police officer or a fireman when they're on duty or the killing of a prison guard. That's capital murder. Another type, as I think the Judge mentioned this morning, is a mass murder like we had at a bar a year or two ago. The third kind is what we're dealing with here. As the judge mentioned; it's what we call murder plus. It's murder in the course of committing another offense. In our case, it's the offense of robbery.

Basically, what we've alleged in the indictment, Mr. Rand, in that this Defendant, Thomas Joe Miller-El, did knowingly [1803] or intentionally cause the death of another individual and that's murder, plain murder, but we've gone on further and said that he cause the death of that individual while in the course of committing or attempting to commit the offense of robbery. Now, we've got murder in the course of committing robbery. Is that the kind of thing that falls within your idea of a crime for which the death penalty should be considered?

A Yes, because of the murder knowingly. It wasn't a case of, say, self-defense or an accidental type thing.

Q Okay. Let me just touch on that for a minute, since you brought it up. We talked about murder in the State of Texas. We're excluding thing like self-defense or accident or insanity. If something was done in self-defense and the jury finds that it was done in self-defense, then that person is not guilty of the offense of murder. By the same token, if it's an accident, they didn't knowingly or intentionally cause the

death of someone, but it was an accident, then it's not murder. It's a not guilty or maybe an [1804] involuntary manslaughter or something like that, but it's not murder. If a person is found to be insane, they're not guilty if they were insane at the time they committed the offense.

Basically what you're telling me is, you could consider the death penalty for this type of case; is that right?

A Yes, sir.

Q Now, Mr. Rand, I don't like to pidgeonhole people and I don't really like to put people into categories, but I guess it kind of serves a purpose for me in this situation. I guess there are about four categories of people who come in and talk with us on cases like this. The first category is the person who comes in and believes in the death penalty, believes strongly in the death penalty, and says "I can sit on a jury and I can listen to the facts and I can assess the death penalty if it is warranted. I can handle that." The second group would be a person who believes in the death penalty. There's no question about that, but for moral or philosophical or religious reasons, whatever, [1804] they don't feel like they're the type of person who can sit on the jury and actually be involved in assessing the death penalty. They feel it's right and they feel it serves a purpose, but they don't feel like they could be the ones to actually do it. The third group is a group of people who are against the death penalty, but they don't really feel all that strongly about it. If called upon to serve on a jury and answer some questions, they could do that even knowing it would result in the death penalty. Although they don't really believe in it, they just don't feel that strongly one way or the other. The fourth group is a group that doesn't believe in the death penalty and will not be involved in assessing the death penalty under any circumstances whatsoever. Can you give my an idea of where you fit in those groups?

A Probably in between the first two, sitting in the jury an being able to say, "Okay, he's guilty." And being able to do that. But again, somewhere along the line, I would probably think to myself, you know, "Can I do this?" You know, right now I say I can, [1806] but tomorrow I might not.

Q Okay, Well, let me just kind of—you know, lawyers, when we're picking juries and talking about things, we kind of talk in the abstract. We talk about, well, could you do this in a case, could you give the death penalty in some case, somewhere, you know, but now, as you've realized, I guess, from this morning, this is real. We're here now and we're talking about that man sitting right there. In this case, if the evidence is presented the way we anticipate it will be presented, we will ask you, number one, to find hum guilty of capital murder. We will ask you to find that the answer to those three questions are yes, a yes answer to each of those three. Now what that means is, that man right down there, Thomas Joe Miller-El will be, at some point, taken to Huntsville, Texas and he'll be placed on death row and, at some point, he will be taken to what's called the death house in Huntsville, Texas and h will be strapped onto a gurney and an IV will be inserted into his arm and, as he lays there, a substance, lethal substance, will be injected [1807] into him until he is dead and that will be as the result of the verdict that twelve jurors rendered in this particular case. Now, I don't say those things to scare you or to make things seem horrible, but I feel—it's just like applying for a job, Mr. Rand, we feel like you need to know what you're getting into because once you have a seat over there, it's too late to say, "Hey, wait a minute, I just can't do something like that." Although we can't go into the facts of the case and we can't go into any of the circumstances surrounding the case, I want to tell you as much as I can about what you're going to be dealing with so you can tell me now whether you can serve or not serve on this kind of case. Let me assure you of one thing, I told you that we have talked to thirty-seven people or thirty-six before

you and we have two jurors. It's no great sin of it's not bad citizenship or something like that if you can't serve on this jury. It's a big decision and it's—

MR. CUNNINGHAM: You Honor, we're going to object to counsel for the State inferring that this [1808] panelist cannot serve on this jury. Everything that he has said so far indicates that he is qualified both by the law and by the questions that Mr. Nelson has asked him.

THE COURT: Overruled, Go ahead.

Q I don't mean to infer anything on way or the other, Mr. Rand, but you made the comment that you don't know what you're going to feel like tomorrow when it rally comes down to it and that's why I'm asking you. Nobody is going to force you to do something that's going to violate your conscience or bother you so much that it's going to affect you deeply and emotionally for the rest of your life. No one is going to ask you to do that. I go back to my job analogy. The Judge told you about the oath that you would have to take if you're going to serve on this case. I will a true verdict render according to the law and the law and the evidence. Some judges put so help me God on it and some don't, but that's the oath. You don't [1809] have to take the oath. It it's going to bother your conscience or you just don't feel that you can ,in good conscience, do something like that, no body is going to ask you to do that. Again, I've rambled on and rambled on about things and I'm not giving you much time to talk or think, either one, but I don't mean to do that. It's difficult not sitting over there right now, I know that, but we need to ask you what—do you feel like you could serve on this kind of jury and answer those questions yes, if the evidence calls for it, knowing that, without question, without option, that results in Judge McDowell assessing the death penalty for that man sitting right down there? Do you feel like you can do that?

A Yes, I do.

MR. WEST: I'm sorry, what was that?

A Yes, I do.

Q Okay. Now, you hesitated a few minutes ago and –

MR. CUNNINGHAM: Your Honor, we'll object to that. He didn't hesitate.

[1810] MR. MACALUSO: Excuse me, Judge. There's nothing wrong in making a legal objection, Judge, but—

MR. CUNNINGHAM: Your Honor, we would object to he statement by Mr. Nelson that he hesitated. The prospective juror did not hesitate. The first time he nodded his head and the second time he said yes and then the third time he said yes.

MR. MACALUSO: That's not a legal objection, Judge.

MR. CUNNINGHAM: Your Honor, I object to him inferring that the prospective juror did something that he did not do.

THE COURT: I think Mr. Rand is taking care of himself pretty well. Overruled. Go ahead.

Q Let me rephrase what I was saying, Mr. Rand, and, if I say anything at anytime that misstates anything you've said or if there's anything you don't agree with, I hope [1811] you'll tell me, I think you will. You've been talking and you're strong enough to tell me if I say something wrong of something you don't agree with. I want you to, but I remember you saying a few minutes ago that, well, you could today, but you aren't sure of how you'll feel tomorrow. That's what I was coming back to, have you given it enough thought now that you fell like you're pretty certain you could do something like that?

A Yes, I do.

Q. Okay, So if we seat you over there and we prove beyond a reasonable doubt that this Defendant down here

knowingly or intentionally caused the death of another individual without any legal justification or excuse and he did it while in course of committing or attempting to commit robbery, you will find him guilty of that , if we prove it to you?

A Yes.

Q Okay. Now, the burden of proof stays here. It's always here and we have to prove beyond a reasonable doubt and you'll make us do that, I take it?

[1812] A Yes, I would.

Q Okay. And you're telling us, that further, if after you've heard all the evidence, the answer to each of those three questions is yes you can answer those questions yes knowing that the result would be that that man would be executed right down there?

A Yes, I could.

Q You're telling me you can do that?

A Yes.

Q Now, Mr. Rand, under the old system, up until about thirteen years ago, the jury, on a capital murder case, actually went out on punishment deliberations and put on the verdict form life of death. There was no answering questions. Thirteen years ago the legislature implemented this procedure, using these questions and saying life or death, even though, you understand, the effect is the same. We're getting to the same place, but we're just using a little different road to get to it.

Now I guess that's put in there [1813] as kind of a buffer and that brings me to my next question. If after you've listened to all the evidence and heard all the evidence, if you're so mad, so enraged by what you heard that you thought this guy has to have it based on the facts, that's the way you feel, but we present evidence and we don't prove the the answer to question number two is yes, in spite of your feelings and in spite of you thinking you're so mad that he's

got to have it, that's all that is good for him, could you still answer that question no realizing that it would result in a life sentence rather than a death sentence?

A If it wasn't proven to me.

Q Okay. The other side is, if we proved to you that each of those questions should be answered yes, beyond a reasonable doubt we proved that to you, even though you feel that he should get life sentence, can you answer those questions yes knowing that results in him being executed, even though you personally feel he should get a life sentence?

A Yes.

[1814] Q Any problem with that at all?

A No.

Q Okay. Now, Mr. Rand, we talked a little bit about murder a few moments ago and you mentioned that you could consider the death penalty if there was no self-defense and no accident and that kind of thing. Let me touch on that again. If we proved to you—and we aren't saying this going to happen in this particular case, but it might. Under this indictment, we have to prove to you murder in the course of committing or attempting to commit robbery. If we present evidence to you and all we prove is murder, he knowingly or intentionally caused the death of another individual and we don't prove anything about robbery at all then, would you agree with me, all we have then is just straight murder, not capital murder—

A Yes.

Q —because we don't have the extra crime? Okay. Now. When we talk about murder, we're saying knowingly or intentionally caused the death of another individual. We aren't talking about self-defense where people were in [1815] a fight and one guy pulled a knife an the Defendant shot him or something like that. We aren't talking about accidents where it wasn't knowingly or intentionally. It was an accident. We aren't talking about insanity where the law says

the man was insane. We're talking about the person knew he was going to kill, intended to kill and killed without any legal justification or excuse whatsoever. Okay. Even if it was a killing in the heat of passion where someone is just so enraged about something that had happened to a member of his family or something that they went and shot the guy that did it, that's not murder. That's voluntary manslaughter. It's not murder. What we're talking about is knowing or intentionally causing the death of another individual, no in the heat of passion or without any legal justification or excuse whatsoever. Okay. Are you with me on that?

A Yes.

Q Okay. What do you feel should be the minimum possible punishment for the knowing and intentional taking of another human being's life without any legal justification or excuse?

[1816] A I think I could still go with the death penalty on that.

Q You would still go with the death penalty on that. Okay. So you feel, if one person takes another person's life, that kind of—I guest ht phrase I've heard used from time to time is an eye for and eye kind of situation, is that right, one person takes another person's life, he should forfeit his life?

A Yes.

Q Okay. Would you ever, ever consider a punishment as low as fifteen or twenty years?

MR. CUNNINGHAM: Your Honor, we would object to the form of the question in that the law says – the law sets out what the range of punishment is. I think it is being totally unfair to this prospective juror to try to commit him to a particular number of years without telling him what the range of punishment is and also telling him what the law says his [1817] duty would be.

MR. NELSON: I'm not trying to commit him, Judge. I'm just asking what he can consider, what he can think about, what his feeling are.

THE COURT: I'll overrule the objection, Mr. Cunningham. I'm going to give the lawyers, as you know, a lot of leeway here during voir dire to approach subjects the way they want to as long as the get to the right point eventually. I think we'll see that, so I'll overrule the objection.

Q After all that, Mr. Rand, we're back to my question. Do you feel like for the knowing and intentional taking of another human being's life without any legal justification or excuse could you even consider a sentence as low as fifteen of twenty years?

MR. CUNNINGHAM: Your Honor, we'll object to that question in that it improper because he [1818] left out if it is proved beyond a reasonable doubt in the proper facts and circumstances of that case.

THE COURT: Reask the question, Mr. Nelson.

Q Mr. Rand, maybe I didn't make myself clear. I thought I did. Obviously, if we don't prove the case beyond a reasonable doubt, you're going to find somebody not guilty, right, because that's our burden of proof?

A Right.

Q But assuming that we prove that the person knowingly or intentionally, no accident, not self—defense, knowingly or intentionally kills another human being without any legal justification or excuse whatsoever, then could you ever consider a sentence of fifteen years, down in that range?

A If that's the maximum penalty, yes.

Q If that's the maximum penalty?

A Yes.

Q Okay. Mr. Rand, the law in the [1819] State of Texas says that the maximum penalty for the offense of murder, not

capital murder, but simple murder, is ninety—nine years or life and a fine of up to $10,000.00. That's the maximum. I take it you wouldn't have any trouble considering the maximum, if that were the maximum, is the right?

A Right.

Q If you had your personal way, you would want to consider the death penalty on that situation?

A Well, if it was proven that it was a capital murder.

Q Okay. That's all we ask. Obviously, you can't give the death penalty for a regular murder case?

A No.

Q The minimum under the laws of the State of Texas is five years for the offense of murder. Now, could you, again, for the knowing or intentional taking of another human life, under the proper facts and circumstances, give a sentence of five years for knowingly and intentionally taking another human like?

MR. WEST: Your Honor, [1820] again, improper question, improper as to the form. If he felt as though the case—I'd ask that this be added: If he felt as though the fact and circumstances warranted an assessment of five years. He's trying to get him to commit to five years without telling him if he actually felt it warranted a five year penalty. I would object to the form of the question.

THE COURT: Mr. Rand, the question is, in a proper case, if the facts and circumstances warranted it, where you had found someone guilty of the offense of murder and you thought that five year sentence was proper could you assess it?

MR. RAND: Yes, if that's the sentence that could be given.

THE COURT: Go ahead, Mr. Nelson.

[1821] Q Mr. Rand, you, as a juror, would decide what sentence is going to be given. Okay. You wouldn't be required to give five years. You aren't required, as a juror on

a murder case, to give five years. You can give anywhere up to life of ninety-nine years, I thought I heard you saying – and I was having a little trouble hearing because you were talking to the Judge—that you could do that if that was what you had to do?

A Yes. If that what was put upon me, to say, "Okay, he's guilty and we're going to give him five years," would I go along with that, yes.

Q Okay. Somebody is not going to tell up that you have to give five years. That's your decision. If you can't consider and assess five years, under the proper facts and circumstances, the that's fine. Nobody is going to argue with you, but we're just trying to find out because, again, we're going to have to have twelve people who we feel are suited to serve on this particular kind of case. This is part of that, so I guess I'll ask the question [1822] again. Could you give five years in a proper case where the facts and circumstances justified it or would you, from what you've told me, want to give more than that?

A I want to give more.

Q Okay. Are you telling me, if the facts and circumstances—well whatever the facts and circumstances, you could not give a five year sentence for the offense of murder, knowingly or intentionally taking another human being's life?

MR CUNNINGHAM: Your Honor, we'll object to the form of the question because, again, it leaves out the – what the law says, if he felt under the facts and circumstances of that case it warranted five years, could he give five years.

THE COURT: Reask the question, Mr. Nelson.

Q You said earlier, Mr. Rand, that you even thought a person like that should get death. If you were setting the laws, you would allow death to be considered, is that right?

[1823] A Yes, I would have it consider it.

Q Okay. But is there any way that you could consider five years for knowingly and intentionally taking another person's life?

MR. WEST: Your Honor, again, I would object and my objection is that it is an improper question. Improper question in that the question should be, under the proper facts and circumstances in Mr. Rand's mind, if he thought the facts and circumstances warranted it, could he consider and also give five years for murder as Mr. Nelson described it?

THE COURT: Do you understand the question, Mr. Rand?

MR. RAND: I think so, What he's saying, warranted, does he mean, okay, this what is going to be given or exactly what is it?

THE COURT: Well, I think you've answered the question properly, Mr. Nelson, go ahead. [1824] Reask the question.

Q Mr. Rand, again, when we talked about—when you've heard me use the work warranted, no one is going to dictate to you as juror, what the sentence must be. Nobody is going to dictate to you that it must be five years, any more than anyone is going to dictate to you that it must be twenty years or it must be forty-five years or anything else. If you're a juror on a murder case, you're the one who is going to make that decision yourself. What we're asking you, basically, is—

you've already found somebody guilty of knowingly or intentionally taking another human life without any legal justification or excuse, Are with me to that point?

A Yes.

Q Okay. Once you've found them guilty of that, could you ever, under the proper facts and circumstances, vote for a sentence for five years in the Texas Department of Corrections for the offense?

MR. CUNNINGHAM: Your Honor, we will object to the form of the question because it eliminates that [1825] part that the law says it should have and that is, if he felt that the facts and circumstances of that case called for five years, could he consider it and do it.

THE COURT: Go ahead ask the question.

Q Mr. Rand, let me just put it as dimply as I can put it. Would y ever feel five years was justified under any fact and circumstances for the offense of murder?

A No.

THE COURT: What was you answer, sir?

MR. RAND: No.

Q You've told us, I think, that you feel death should be proper. If you were setting the law or you were making the laws yourself, you would feel that death should be proper consideration under those circumstances?

Q Yes, it should be considered.

Q Okay. Now, Mr. Rand, I remember an old show years ago called Queen for a Day. If you were governor for a day and you could set the minimum punishment in the State of [1826] Texas for the offense of murder as I've stated if out, knowingly or intentionally causing the death of another individual, what would you set?

A Probably the maximum that you gave me, ninety-nine or life.

Q Okay. You would set that as the minimum?

A Yes.

Q Okay. And there's no way you could ever consider and give five years for that offense, is that right?

MR. CUNNINGHAM: Your Honor, again, we object to the form of the question, It's an improper question the way he asked it of this prospective juror.

Q Under any facts and circumstances, as long as it's a murder the way I've laid it out?

MR CUNNIGHAM: Your Honor, we will object to the form of the question. It's an improper question.

THE COURT: Ask the question [1828] again or I'm going to take it over.

Q Mr. Rand, am I confusing you?
A No.
Q You think you understand what I'm asking?
A Yes.
Q Okay. I certainly don't mean to confuse you and, if I didn't tell you at first, I'll tell you now. If I am or if you have a question, ask it, because I want you to be clear on what we're talking about.
A Okay.
Q I thought I understood you to say, if you could set the minimum at life or ninety-nine years and you would have death be a consideration?
A Yes.
Q Now, I thought you told me that, under no facts and circumstances, ever, would you consider a sentence of five years; is that right?
A Right.
Q Okay. Mr. Rand, I told you up front that I'm not going to argue with you and [1828] I'm not. I would guess from what you've told me—and you've been pretty definite about it—even if I sat here and talked to you for two weeks, I wouldn't change you mind on it, would I?
A No.
Q And that's the way you feel about it and that's the way you're going to feel about it, is the right?
A Right.

Q Okay. I don't have any problem with that and nobody is going to argue with you or try to change you mind at all. I guess nobody could, if they wanted to, is that right?'
A Right.
Q Okay. Mr. Rand, no one has a right to argue with you about that and no one should argue with you about that because that's your opinion and that's why we have up here, is to find out how your feel about things, so I'm sure nobody else is going to argue with you about it, either. I'm about of time and I've thrown a lot of stuff at you. You've been very open and honest with me and I appreciate that. Do you have any questions for me? Is [1829] there anything else we need to touch on here that I haven't touched on?
A No. I think everything is pretty clear right now as far as what you've asked me. I think I've understood everything.
Q Okay, I don't think I have any other questions for you, Mr. Rand, if you don't have any for me, There's no way, even if I kept discussing it with you, I could change your mind, so I'm not going to bother you any more. I appreciate very much your time and your patience with me and the openness of your answers. These lawyers will probably want to talk to you a little bit. Thank you very much.

MR. NELSON: Your Honor, we'll submit the juror.

THE COURT: I'll add a couple minutes onto your time to cover that submission, if you want to.

MR. WEST: If it please the Court.

THE COURT: Go ahead.

[1830] EXAMINATION

BY MR. WEST:

Q Mr. Rand, my name is Royce West. How are you doing this afternoon, again?
A Okay.

Q Okay. First of all, let me assure you that no one is arguing with you. Did you feel as though Mr. Nelson was arguing with you about anything?

A No, not really.

Q Okay, I'm not going to argue with you about anything, either , okay?

A All right.

Q Now, it's okay to feel the way you feel about certain matter. There's no problem with that at all. In fact, I would defend your right to say what you want to say. Do you understand what I'm taking about?

A Yes.

Q Okay. Now, Is this your first time ever to come down for jury duty?

A Yes, it is.

[1831] Q Okay. It's an experience and a half?

A Yes, it is.

Q Okay. Do you consider yourself basically a law and order person?

A Yes.

Q Do you feel as though you the law?

A Yes.

Q And that everyone should follow the law?

A Yes.

Q Okay, How much do you know about the judicial system?

A I guess not a lot.

Q You realize that everybody has a right to be tried by their peers?

A Yes.

Q Now, one thing that Mr. Nelson was harping on was your ability to take into consideration, under the proper set of facts and circumstances, and assess the minimum and also the maximum penalty in a murder case.

Q Okay, Now, no one is trying to get you to commit to anything, you realize, as [1832] he indicated, the minimum

for murder is five years and the maximum is ninety-nine years, life and an option of fine of $10,000,00. Our legislature set that range of punishment. The people down in Austin who make the laws, they set that range of punishment because you can have fifty million different fact circumstances that call fall within that range of punishment, so they wanted to give people that particular range to work with when they're serving on a jury and when they're making a determination as to what the proper sentence should be. Do you understand that?

A Yes.

Q Okay, Now, I'm not asking you to commit one way or the other to saying that you would give somebody five years in the penitentiary. I'm not asking you to do that, but I'm asking you, if you felt as though you, if you felt as though the proper facts—number one, you found someone guilty of murder, okay—and circumstances existed in your mind, that under those facts and circumstance that you would, number one, consider and, if your felt as though the circumstances and the [1833] facts called for it, assess penalty of five years. I'm not saying that you have to—again, this is your first time down here. There's fifty million circumstances and you don't have to think of one in your mind, okay?

A Yes.

Q And you know that's what the law is, five years to ninety-nine years of life. I'm asking you, could you consider, under the proper facts and circumstances, assessing a minimum of five years confinement?

A If I had to.

Q Okay. If that's what the facts called for?

A Yes.

Q How, Let's explore that a little bit more. You said if you had to. You don't have to do anything.

A Right, Well, when I said that, I was meaning as to what you added onto it, if the facts—

Q If you felt the facts called for it?

A If that's what it called for, yes.

Q I'm kind of misunderstanding you. [1834] You said if that's what it called for. What do you mean?

A Okay, When I said that, I was meaning as of what you tagged onto it, if that's what the facts brought about to it and this was it. Myself and my preference would prefer to have more, but I would consider it.

Q If you felt as though the facts called for it, you could assess it; is that correct?

A Yes, I could.

Q Now, what I want to make sure that you understand, no one is trying to commit to saying " I will give five years." "I'll give life." What we have to know—and there's some confusion as to whether you can consider the full range of punishment, from five years to life. In your mind, if you said these facts called for it, even though a person knowingly and intentionally took the life of someone else without any legal justification such as self-defense or any legal excuse such as insanity, that he knowingly and intentionally took the life of someone, that I can consider the full range of punishment, for five years to life, [1835] and a $10,000.00 optional fine. I can consider it and, under the proper facts and circumstances in my mind, if I felt as though the facts warranted it or justified it, I could give that person five years?

A I could consider it.

Q And you could do it if you felt as though the person should receive five years; is that correct/

A If I felt that.

Q Okay. Understand something now. I'm not saying that you have to give it to a person. I'm saying, if you felt as though the facts and circumstances called for it, that you would give a person five years?

A I would consider it.

Q You said that you would consider its?

A Yes.

Q The law requires—and this is the law— that you no only be able to consider it but you would be able to do it, also, if you felt as thought the facts called for it, I'm not trying tog get you to commit to it. I just want to make sure you have an open [1836]mind to it.

A Well, I think I could, but I wouldn't want to—well, I couldn't then.

Q I'm sorry?

A Well, I few don't have that difference, I would say I couldn't because I couldn't consider—

MR. NELSON: Did he say could not?

THE COURT: I don't know.

MR. RAND: Right.

A Because I could consider it, now, whether I would like to or not, in my own opinion, I wouldn't want to. Is that what you're asking me?

Q You're saying that you wouldn't want to. I don't have any problems with that. I'm just saying, if you felt as though the facts and circumstances called for it in your mind—again, this is your first time down here and there's fifty million circumstances that could come up where a person knowingly and internationally took the life of someone else without and legal justification or legal excuse. I'm saying, you know, would you keep [1837] an open mind and, if you saw those farts and circumstances, would you, not only consider it, but also assess the minimum of five years?

A Yes.

Q You can do that? Again, I'm not trying to tie you down to saying you're going to give somebody five years, okay?

A Yes.

Q I'm not trying to tie you down to saying you'll give somebody life, either, but I want you to be able to, if you can, and you siad that you could, consider the full range, from five

years to life, and, if the facts and circumstances, in your mid, called for it, be able to assess the minimum of five years, which you said that you could, or assess the maximum of life, which you have to call it like you see it. No you understand what I'm talking about?

A Yes.

Q Can you do that?

A Yes, I could.

Q All right. Now, let me ask you this—Mr. Nelson basically asked you the same question. Was there some communication problem that you didn't understand what he was saying [1838] or what?

A Well, maybe what I was understanding from him was—they way I took it was what would I do. Okay, Your question was, could I consider or be able to. Yes, I could. Under his consideration, I would want more, but I could consider and give five years if I had to.

Q If you felt it was—

A Well, If that was that was adjustable.

Q I'm sorry?

A If that's what was adjustable under the facts and circumstances.

Q Yeah, that's all I'm saying. You know you may very well want to—let's get off that for a second. I see that you—what school did you graduate from?

A Skyline.

Q What particular cluster were you in?

A I came out of plastic technology, The first three years I was in automotive.

Q I was noticing some of the literature that you've read that dealt with [1839] automobiles. Again, would this be a fair statement, that people should obey the laws as handed down by our legislature?

A They should.

Q Okay would it be a fair statement to say that everyone should, in fact, try to be involved in voting and the jury

system and the criminal justice system, also? People should try to be involved in civic affairs is basically what I'm saying.

A If they prefer to.

Q Okay. Now, what are your thoughts about the criminal justice—have you ever just thought about the condition of the criminal justice system?

A No, I haven't.

Q I'm sorry?

A No, not just serious thought.

Q What are some thoughts that you've had about the criminal justice system?

A Well, possibly say a crime of maybe just robbery and then a separate crime o, say murder. Why could, maybe, the guy that murdered somebody go to jail for five or six years and that's it and maybe a guy that [1840] steals something from a Seven-Eleven has to go for fifteen.

Q So unequal Justice?

A Yeah, You know, it sounds kind of funny.

Q What doesn't sound—

A He, myself, being on the outside I'm looking at what is there on the pager in the news I don't know the facts or anything, really, behind it, but all I see is, okay, this man got fifteen years for robbing a Seven-Eleven and this guy got five of a killing.

Q Do you understand that there are probably a lot variables that you and don't know about?

A Yes, That's what I'm saying. I don't know all of the background to it.

Q Exactly, because there may be one situation where a person gets five years for robbery and a person gets fifteen years for murder?

A Yes.

Q And it's a plea bargain as opposed to a jury trial or a trail before the Court, There are a lot of variables involved; [1841] do you understand?

A Yes.

Q It gets basically back to what I was talking about. There's a wide range of punishment open for various types of offenses. Did you know that aggravated robbery was a first degree felony offense and that the minimum you could get was five years just like in a murder case?

A I didn't.

Q Okay. Did you know that burglary of a home is a first degree felony just like murder. Just like aggravated robbery and the minimum you could get is five years and the maximum you could get is ninety-nine year or life and an option of a fine of $10,000.00.

A No, I didn't.

Q There are numerous other first degree felonies; also. Now, the only thing that the law requires, in order for you to serve on this jury, is you be able to consider the full range of punishment, that being from five years to ninety-nine to life, and, under the appropriate facts and circumstances, in your mind, if the facts called for it and you [1842] feel as though it's justified, be able to assess the minimum of five years and, if the facts called for life, be able to assess life. Can you do that?

A (No response.)

Q Again, this is an individual thing, being able to consider it and, if you believe in your heart that the facts call for it, be able to give five years. I believe you indicated earlier that you could.

A Yes, I could.

Q Can you do that sir?

A Yes, I could.

Q How, you're telling Mr. Cunningham and myself, as Mr. Miller-El's attorneys, that you could consider and assess five years if you believed in your heart that the facts called for it?

A Yes.

Q Now, do you understand what Mr. Nelson and I were talking about concerning the minimum sentence of five years?

A Yes, sir,

Q Do you have a full understanding of it?

[1843] A Yes.

Q And basically the full range of punishment?

A Yes.

Q Mr. Rand, I believe you're qualified to serve on this jury. Thanks you, very much,

MR. WEST: I'll pass the juror.

THE COURT: I'll hold that the juror is qualified on your submission, Mr. Nelson. You still have about a minute left on your record of time.

[1844] EXAMINATION

BY MR. NELSON:

Q Mr. Rand, again, the last thing I want to do is argue with you myself, but you realize that you told me one thing and told Mr. West something else and I guess there is some confusion there and I don't want you to be confusion there and I don't want you to be confused. You kept going back to if it was up to you or what you would do. I think words were used, you know, what would I do. I thought you told me that, if you were making the decision, you would want either life or death for this type of offense, is that right?

A Yes, but the way he questioned me, I could consider five.

Q Okay. What we're talking about, if you're on a jury and you're sitting over there on the jury and you hear the facts and it's been proved to you beyond and reasonable doubt that this Defendant Knowingly or intentionally took the life of another human being, killed them, knew he was going to do it and did it without any legal justification or excuse whatsoever—it's easier to talk in the abstract. We're talking

about a guy who has [1845] been found guilty of killing another human being and you're sitting on that jury, We're just asking you to be as honest about it as you possibly can be. I know that's what you're been trying to do, but being just as honest about it as you can with us and with yourself; could you really consider and assess a five-year sentence under any circumstances?

MR. CUNNINGHAM: Your honor, we'll object to that as an improper question in that, if he felt that the proper sentence was five years.

THE COURT: Do you understand that, Mr. Rand?

MR. RAND: Uh-huh.

THE COURT: Go ahead and answer the question.

A Okay, I could consider it.

Q If you were sitting as one of the jurors in that box, could you sign your name saying, "I'm not just thinking about it. I'm going to give this guy five years. He killed somebody. He knew he was going to do it. He did it, but I'm going to give him five years."?

[1846] MR. WEST: Your Honor, again, that's an improper question. I f the facts and circumstances call for it and he believed in his heart that the person should get five years. Improper question.

THE COURT: Ask the question, Mr. Nelson, one more time. Your time is up though, but go ahead and ask it one more time.

Q Mr. Rand, again, I'm just trying to find out what you really feel, down inside what you really okay, You've convicted somebody of murder, not voluntary manslaughter, not self-defense, no accident You've convicted them of murder, knowingly or intentionally cause the death of another human being and you're found them guilty beyond and reasonable doubt and you're sitting on the jury You've heard

all the facts and circumstances. You know everything you're going to know. You've said, in a proper case, you could consider five years, but you also kept saying that, if it were up to you, in [1847] your heart, you would want to give more. AM I right about that?

A Yes.

Q Okay, so even if the facts and circumstances justified it where you could consider it, being real honest about it, could you give it?

A Yes, I could Is there any question about that, because you've changed from what you told me before?

A No—well, I don't know. From the first time you adked me to now, if maybe the way you said it or my understanding was different, but I could consider it and if shown, yes. But I could consider it and, if shown, Yes. But tI could consider it and, If shown. Yes. But under the same token, I would think that I would want more. If it was proven, then okay, he gets ninety-nine years, I would go that way, also.

Q You understand that nobody is going to prove to you—

MR. WEST: Excuse me. Your Honor, I think the state's time is up we keep going over it. He's already said that he could [1848] consider it and, under the proper facts and circumstances, he could do it. The State is asking for additional time and the Court has already told him that his time was up. I thought he had already asked his one question else.

THE COURT: Mr. Nelson, bring it to a close.

MR. NELSON: I'm trying to, Judy, but he said something else in the same area that I want—

THE COURT: I think probably the lawyers could be here all afternoon the way we're going.

MR. NELSON: Is the Court stopping me at this point?

THE COURT: Go ahead and ask one more question.

Q I've forgotten exactly the words you used now, Mr. Rand, but you're telling us—well, you said if it was proven to you that he had to get ninety-nine years—I think the words you used were something to that [1849] affect—or it was proved to you that he had to get five years—

A That it was adjustable on that case.

Q You understand that it is always going to be your decision? It's up to you. Nobody is going to prove to you that anybody has to get five years and, if you couldn't consider and assess five years in a proper case, then that's fine. Nobody is going to get down on you for being a bad citizen or anything else because you can't. We just need to know.

A I could consider it, but I couldn't sit here and say that I would give it to him. Is that what you're asking?

Q Well, we can't commit you right now to saying htat you would do it.

A I could consider it but I couldn't say whether I would give it to him.

Q The law says consider and assess. Okay. Not only consider, but you have to be able to tell us that you could give it.

A Yes, I could.

Q You're saying that you could?

MR. WEST: He's already [1850] answered the question two times, Your Honor.

THE COURT: Well, he's through now. Mr. Rand, the only question I want to ask—and you're probably tired of these lawyers asking you questions, but let me sum it up to make sure that I understand. The law says that everyone of these twelve jurors who are going to be sworn in thie case has to have an open mind to the entire range of punishment that might be provided for in this particular case. Now earlier on—and we're not even arguing about this—you told the

State that, in a capital murder case, if they proved those questions to your satisfaction beyond a reasonable doubt, you could answer them yes. We're not talking about that. We're talking about a case where you, as one of the twelve jurors, has found a [1851] Defendant guilty of the offense of murder, which is the intentional or knowing or both causing the death of some individual by some manner or means. The punishment range for that offense of murder, under our law—it applies in all murder cases and not just this one. But in any murder case—is a prison sentence of not less than five nor more that ninety-nine years or by a life sentence. I don't know if the lawyers mentioned it or not, but there is also an optional fine of up to $10,000.00 if the jury wants to fine in addition to a prison sentence.

Now, what the law say is each juror who is seated must be able to set a punishment somewhere within that range depending on what the facts and circumstances of that particular case tell you, as an individual juror and then [1852] you working together with the other eleven jurors, is a proper punishment in the case. Now, what the lawyers are asking you is, and it was asked several different ways at several different times—now, let me qualify my question by telling you some of the things the lawyers said.

You don't have to imagine a case it would take for you to assess any particular punishment. In other words you don't have to be able to tell m, well, I could give ninety-nine years if it involved killing a baby or something like that or I could give five for this or that. In fact, the law wouldn't even let you do that because that means in my mend and, I think, in the law's mind that would be the only case in which you could do that particular thing. The law doesn't require you to imagine the facts [1853] it would take you, in your mind, to vote for some particular punishment. The law does say that you have to have an open mind to the entire range of punishment so, if you heard a set of facts in a murder case,

after hearing all those facts and those circumstances, having found the Defendant guilty of the offense of murder—and we talked about what that was, but you found him guilty of murder—if the facts and circumstances presented themselves to you and in that particular case you thought a proper punishment was a five year sentence, which is the minimum sentence, you could and would vote to assess that as the punishment in that case. Now, the question to you is, in a proper case, if the facts and circumstances warranted it in your mind, could you and would you vote to assess a five-year sentence?

[1854] MR RAND: Yes, I think I could keep an open mind.

THE COURT: Can you give me a yes, I would—

MR. RAND: Yes.

THE COURT: —or a no, I wouldn't

MR. RAND: Yes.

THE COURT: I'll hold that he's qualified, Mr. Nelson. What says the State?

MR. NELSON: At this time, Your Honor, the State would exercise a preemptory challenge.

MR WEST: Your Honor, I want the record to clearly reflect that—

MR. NELSON: Could we take this up outside—

MR. WEST: Judge, I think it should be taken up in front of Mr. Rand's face.

THE COURT: Well, I'll let it be done at this time.

MR. WEST: I want the record [1855] to clearly reflect that Mr. Rand is a black male and he's twenty-three years of age.

THE COURT: Mr. Rand thank you for your patience with us, first of all. You will be excused for service in this case. If

you would leave your badge with the bailiff as your go out—this is off the record, Pam.

(Whereupon, an off-the-record discussion was held after which the following proceedings were held.)

MR. NELSON: The State exercised its preemptory challenge because Mr. Rand was ambivalent about the death penalty and at the first of the voir dire, his ability to serve on a jury like this and he stated himself that he wasn't sure whether he fitted in category on where he could serve on the jury or category two where he could not. That was the [1856] State's concern for exercising a preemptory challenge in this case.

THE COURT: Let's take a short recess so I can make a phone call I should have made two hours ago.

Mr. MACALUSO: Judge, If I may say something. I realize that everyone has the right to make a legal objection, I guess, at the time. I didn't really actually keep count this last time, but if there were ten objections over this very limited area, ten nonlegal objections, to questions—and I miscount—all I'm asking, Judge, is, if we stand up and make a nonlegal objections, the Court call it to out attention, as I've ask the Court to do with the other lawyers in this case, if we're ever going to get a jury in this case.

MR. CUNNINGHAM: Your Honor, the only reply we would make to

* * * *

[2000] CARROL S. BOGGESS,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Good morning. I'm trying to crank up on time here this morning and get my voice going here. Ma'am, let me begin by reintroducing most of the people who will be involved in this case. We were introduced to you the other day. My name is Paul Macaluso and the man that just walked out, who will be seated right next to me in just a moment, his name is Jim Nelson. Once the trial begins, we will be joined by another lawyer. His name is Norman Kinne. We're all assistant district attorneys and we work for Henry Wade who, I'm sure you know, is the district attorney here in Dallas. He's designated us as the lawyers to represent the State in this case.

Now, the gentleman that I'm pointing to at this moment is Mr. E. Brice Cunningham.

[2001] MR. CUNNINGHAM: Good morning. How are you?

Q I imagine in not too long he will be joined by Royce West. He will be seated between the Defendant and Mr. Cunningham. Mr, Cunningham and Mr. West are defense attorneys who have been appointed by the Court to represent the Defendant. He is seated to your very far right. You can see him, I think, if you lean forward. He's in the powder blue suit there. His name is Thomas Joe Miller-E1. He is charged with capital murder and he's the Defendant. Now, the reason why I've taken—that's Mr. Nelson.

MR. NELSON: Hi.

Q The reason why I've taken the time to reintroduce every one here is to let you hear our names again and then reacquaint you with the roles that we all play in this case so you know what we do or are supposed to do. I would just like to ask you if you know or recognize any one of us?

A From yesterday.

Q Other than from yesterday?

A No.

[2002] Q I know your husband works in the district clerk's office. I think I know—

A I'm sure you know him. He's been here a while.

Q

Q He's been around for quite a while, hasn't he?

A Yes.

Q I don't think that we have ever met. I don't recall having met you, but I see Joe here all the time. As you will know, Ms. Boggess, you are a prospective juror on this capital murder case. As I'm sure you know at this time, capital murder is a very, very serious offense. In fact it is the most serious offense under the laws of this state, as you well know, serious because of the nature of the offense. Obviously it involves a capital murder. Equally as serious, I suppose, because of the two possible penalties for a person who is. convicted of capital murder. You know if a person like Thomas Joe Miller-E1 is convicted of capital murder, then he can receive only one of two possible penalties. One is a sentence of death by lethal injection [2003] in his arm or a sentence of life in the Texas Department of Corrections.

You can see obviously how serious everything is connected with this type of case. Probably because of that, Ms. Boggess, the law allows us to talk to you individually as we're doing now. Have you ever been down here on jury duty before?

A Uh-huh. I don't remember the year. I think it was a couple of years ago.

Q It was a civil case, do you think?

A Uh-huh.

Q If you were talked to by the lawyers as I'm pretty sure .you would have been, you were probably talked to when you sat out there in the gallery, weren't you, and you were asked questions and you answered up in front of everybody else. That's fine for most cases because most cases don't involve the death penalty and how you feel about the capital punishment laws and the death penalty statute and so forth and so on. The law allows us to .talk to you individually, kind of semi-privately, like we're doing now because they want you to relax as much as you can. Are you [2004] a little bit nervous?

A No, not really.

Q Well, there is no need to be nervous because nothing you can say will be wrong. For that matter, it won't be right, just as long as you tell us how you feel. No one is going to quibble with you or quarrel with you, argue with you, try and talk you into anything or out of anything. You are the most important person here in this room right now and your opinion is the most important opinion. So whatever is on your mind, I don't care what it is, if it affects your service as a juror, you just tell us, all right, and you will be doing your job. If we ask the right questions, we'll be doing our job. Fair enough?

A Uh-huh.

Q Now, if you have a questions about anything, Ms. Boggess, by all means ask it because, you know, when you get on the jury you can't ask questions ordinarily of the witnesses and the lawyers and so forth. If there is .anything that you need to tell us, whether we touch on it or not, by all means let us know, all right, just in fairness to both sides.

[2005] Now, in fairness to both sides, let me tell you what our position is just from the very beginning. Ms. Boggess, we are actively seeking—that is, the State is actively seeking the death penalty in this case for that man right down there. It's only fair that we tell you right from the very beginning what

our position is and what we intend to be able to prove and establish once the trial itself begins and then, of, course, what would be expected of the jury on the basis of that .evidence. We are actively seeking the death penalty. That is, we intend to provide this jury with the type and the qualify of evidence—and that would' mean you if you were on this jury—that would convince the jurors beyond any reasonable doubt that the Defendant, Thomas Joe Miller-E1 was guilty of capital murder just exactly as he is charged.

Then in the second phase of the trial, once again, to be able to provide that jury with the type and the quality of evidence that would convince them beyond any reasonable doubt whatsoever that those questions that the judge will give the jury at the end of the [2006] trial should be answered yes. All yes answers, as you know, would result in the law requiring the Judge to sentence Thomas Joe Miller-E1 to betaken some day down to Huntsville, Texas and at an appointed time—the law designates the appointed time—he be taken to the death house to have a needle placed into his arm and thereafter have a lethal substance injected into his body to cause his death as the law requires under those situations.

I'm not trying to make this sound real gory or gruesome, other than the fact, ma'am, that it is only fair to you and every other juror—we've talked to about forty so far—to let you know exactly what the stakes. are in this type of a case. I think you know anyway, but it wouldn't be fair to you to lull you into some sense that this is going to be some kind of a—any other type of case when we know it's not and what the stakes are ultimately.

I think, as you well know, Ms. .Boggess—you're thirty-seven years old and you know the difference between fact and fantasy y or something you hear on TV or read [2007] about and then something when you're caught up right in the midst of it. Do you see what I'm getting at?

A Yes.

Q It's one thing to sit around and talk about what you might do in a situation, what you would like to do or what ought to be done and frequently—I know. I'm forty-three years old myself. I know that it is quite a different situation frequently when you're actually called upon to do something yourself. Do you see what I'm getting at?

A Yes.

Q That's what we want to know and that's why we're talking to you as intensively as we are. The reason I say that is this: You were asked about your feelings about the death penalty and whether or not you could actually serve in this type of case. As you well know, a lot of people have real strong feelings one way or the other about the death penalty, strong feelings one way or the other about whether or not they can actually serve on this kind of a jury because of their personal or conscientious feelings or religious or moral [2008] feelings one way or the other.

Now, I've done a lot of talking here so far as an introduction. Really what every one wants to hear is what you think and how you feel. I know you were asked this question yesterday and were given those three lines there to respond and very little time to really think about it, but could you share with us, Ms. Boggess, now that you've had a night to sleep on it, to think about it, what your feelings are really about the death penalty and whether or not you can actually serve on this type of case?

A Well, I believe I could serve on a case like this, but whether I want to or not is a different thing. I wouldn't want to serve and I wouldn't want to have that responsibility to do that, but if it fell upon me, I would certainly take it and pray to the Lord to help me get through it. My feelings about the death penalty are just as I said, if I believed that a person truly had committed a murder, a premeditated murder or a

murder—you know, intended to do something like that, then I would feel that it was my duty to judge that [2009] person and to decide whether or not that person, you know—

Q I gather from what you're saying you feel strongly, obviously, about murder?

A Yes.

Q That a person ought to be held accountable for a murder type offense?

A Right, or punished for any type of crime that they commit.

Q I notice you put down here on your questionnaire, "Do you believe in the death penalty?", "Yes—only in cases of premeditated murder." I think you went on to qualify it by saying for an intentional murder?

A Right. I wouldn't want—you know, like the Judge talked about, self-defense or an accidental thing or something like that. I certainly wouldn't want to judge a person on that.

Q We'll talk about that in some detail in just a second, but you understand that a person can only receive the death penalty in Texas for a capital murder. A capital murder involves a murder itself. That's a component of capital murder. It's [2010] what we call regular murder—actually it's not called regular murder. It's just referred to as murder.

Murder itself is not a capital offense. In other words, you can't receive the death penalty for what we call regular murder. For example, if I kill Mr. Nelson and just kill him for whatever reason I have for killing him, I cannot receive the death penalty for his murder no matter how violent or brutal or vicious it may have been unless he falls under -a particular category. For example, if he is a police officer and I murder him and I know he is a police officer, he's on duty, I can receive the death penalty for that kind of a murder. But if it is just Jim Nelson, the district attorney, I can't do that. I can't receive the death penalty because that's a regular murder. If I killed you or you killed me, you see, that's regular murder. That's altogether different in the range of penalty. If you kill

a jail guard or a fireman, mass murders, you see, murder for hire, those are capital murders. Otherwise, murder itself is a noncapital offence. Murder is a situation [2011] where one person knowingly or intentionally causes the death of another. You have to understand that that does involve a knowing and/or an intentional killing. I knew I was going to kill him. I intended to kill him. I killed him. Do you see?

Now, what the Judge said about insanity, self-defense, accident or a crime of passion, if you're on a jury and someone is charged with murder, but you believe or you have a reasonable doubt that someone killed as the result of insanity, self-defense, accident or a crime of passion—we'll talk a little bit more about in detail later—then you, don't make it a lower sentence, you see, because if you believe that it is one of those four things, it's not murder, you see, because those are legal defenses or legal justifications for somebody killing somebody else. Do you see what I'm getting at?

A Uh-huh.

Q If you believe that I killed Mr. Nelson because I thought Mr. Nelson was going to kill me or he came at me with a knife and I got my gun first and shot him, you see, then [2012] you don't give me a lower sentence because you thought I acted in self-defense. You find me not guilty just like I would have to find you not guilty if that were the situation and I were on the jury. Am I making myself clear?

A I suppose, but let me go back and say this: I'm not saying that I feel like I could impose the sentence myself—or I'm not going to be imposing the sentence; is that correct?

Q Uh-huh.

A I'm trying to figure out why you've explained all that to me. I understood that, but what I'm saying is, it's not the jury's—it's not my decision to say whether or not he gets the murder penalty or not because that's already been established. The fact is, is he guilty of the crime or not, is that not what the jury is—

Q Well, that's partially correct and then it's a little bit confusing because this is a fairly complex area of the law. Let's talk a little bit about that. You understand that in any criminal trial—you see, any criminal trial is conducted in two parts, [2013] whether it be capital murder or shoplifting. The first part deals only with whether or not a person is guilty or not guilty. In other words, if the State has accused somebody of capital murder or if the State accuses somebody of shoplifting, the State has the burden of proof in all cases. We have to convince you that the person is guilty of capital murder or shoplifting, whatever the case may be. That's the only decision the jury makes.

Let's say if you find him not guilty, obviously, the trial is over. If you find the person guilty of capital murder, then we go on to the second phase of the trial where' the penalty is determined. There is nothing automatic about somebody being given the death penalty just because they are convicted of capital murder. It's not automatic. There's an option there based on the answers to questions.

Now, years ago, up until about thirteen years ago, jurors, after they convicted someone of capital murder, would listen to whatever evidence may be presented in the second phase of the trial—although there [2014] is no obligation for either side to present any more. You may have to make a decision just on what you learned about the offense itself. After the jurors heard the evidence in the first part of the trial, heard all of the evidence, they would go back and actually decide for themselves did the person get the death penalty or should they get a life sentence or should they get some number of years. It's like in the movies. You know, you've seen those movies where the jury comes back and they say, well, we think he ought to hang for that or he ought to get the electric chair, whatever it was, and they actually voted for that. If all of them agreed it should be death, they all gave death.

Let me ask you, do you feel you're the type of person who could make that kind of decision directly?

A I've never been in that situation. I don't feel like I would want to be in that situation and whether I could do it or not, I'm not real sure.

Q Well, that's the reason why we spend the length of time with you now because, [2015] you know, we have to rely—everyone here has to rely on your service as a juror on what you tell us now. There will be times when I talk to, you, Ms. Boggess, where you're—you're going to answer questions probably in the same way I would and everyone else here would if we were in your shoes. I think so. Maybe. I don't know. You understand how important your answers are to everybody here. I don't want to make it sound like I'm putting any pressure on you, but the law does require that we kind of pin you down on some things, simply because the law requires it.

A I understand.

Q You see, if you say I think so, that means you may or you may not. Neither side can make a decision here and neither can the Judge on an answer like that, even though it's very human for you to answer that way. Do you see what I'm getting at?

A Yes.

Q One of the reasons I mention that ,is, in question fifty-eight it says here, "Do you have any moral, religious, or personal beliefs that would prevent you from returning a [2016] verdict which would ultimately result in the execution of another human being?" and you said, yes or you circles yes here. Could you talk a little bit about that?

A Well, I guess what I meant by that is, I do have difficulty—I've never been in a situation like this before, like I said. I believe that the bible states—and I am a Christian and I believe that the bible states that, if someone commits a crime or commits a sin or whatever you want to call it, there is a punishment and it is up to the people that love that

person, the Christians or whatever, to punish that person for that particular crime because God will punish him and I believe he puts us down here to do that same thing. That's what I meant, but now whether or not I could actually go through with murder—with killing another person or taking another person's life, I just don't know. I'd have trouble with that.

Q Okay. You're not the first person to have voiced that opinion. That's why this is as tedious as it is and takes as long as it does because actually nobody wishes to put you [2017] or anybody else, Ms. Boggess, on a jury or in a position to have to do something—let's say to follow their oath as a juror, if they accept that oath—that is going to violate their conscience or their personal feelings that they've held for a long time if that's the situation. Do you see what I'm getting at?

We're not trying to make somebody do something against their conscience. It's just that simple. Sure the law does expect you, as a citizen of this community, to serve on a jury if you can. The law does not expect you, me, these other lawyers or anybody else to serve on a jury or do anything in violation of. their conscience.

Now, there is a big difference, as we all know, between a decision that may be difficult because certainly on a death penalty case, it would be difficult for anybody, I suppose. I'm sure it's not going to bean easy decision for anybody. For some people and, in fact, a lot of people, it's more than just a difficult decision. It's a decision that would cause them, because of the enormity or the magnitude of the situation, you know, being a [2018] part of someone else being executed, they simply feel that would be a violation of their long-standing personal feelings and conscientious beliefs. Do you see what I'm getting at?

A Yes.

Q That's why the Judge told you that the oath the jurors take is an option. You have the opportunity, you or me or anybody, or the option of taking the oath or not taking the oath. It really is—I like the way the Judge put it. He said it was kind of like a job or a job description. When you go and you interview for a job, you find out what all is involved because you want to know what is going to be expected of you once you sign on. Obviously, you're not under any obligation to sign on ordinarily for a new job until—you know, you want to know what it entails and what it involves and what you're expected to do and then whether or not you can do it or you want to do it. Do you see?

Now, that is kind of like this situation. If you're on this jury, for example or anybody is on a jury, you know that the [2019] result of three yes answers to these questions, if the State proves to you or anybody that these three questions should be answered yes, this Judge, I guarantee you, will sentence this Defendant to die. The Judge has no option. I know that the Judge is not going to get mad at me when I say this, Ms. Boggess. He has really little to do with the decision as to life or death. In fact, he has virtually nothing to do except to carry out the will of the jury on the basis of those three answers. You see, three yes answers equals death. Although you don't write death in there like you used to, you might as well. Yes, yes, yes, equals death because the Judge can't change the verdict. Do you see what I'm getting at? If a person is on a jury that last yes equals death. Do you see what I'm getting at?

Now, that's part of the job description and ultimately it boils down to whether or not you feel like you could serve on this jury and participate in the execution of .another human being, that it was something that would both your personal conscience or your personal beliefs. If it doesn't, then you [2020] would probably be qualified to serve. If it does, then there is no requirement that you take the oath. Do you see what I'm getting at?

A Yes.

Q Now, let me back up for just a second. Maybe this might be helpful to us in discussing this. I hate to do this because it puts people in categories and I know it's hard to do sometimes and probably unfair,' but it serves a purpose, I think.

When it comes to death penalty juries and capital punishment, people may be divided into four categories. In no particular order. I'm sure you know, before I go any farther, that rather a person serves on this type of a jury or a person doesn't serve, that doesn't make you a good citizen or a bad citizen because, if it were that way, then we would have about thirty-nine people that were bad citizens. We have only two jurors. We've talked to forty people. Do you see what I'm getting at?

A Yes.

Q You understand that. You don't get any points for serving on this kind of a [2021] jury or any demerits if you don't.

The first category of individual let's say is a person who believes in the death penalty, they believe it is a deterrent to crime or it's necessary for whatever reasons and furthermore, if they had to, they could serve on this jury and they could render a decision that would result in Mr. Miller-El's death. It wouldn't violate their conscience.

The second group says, well, I believe in it and I think we probably need it or it serves some purpose, but because of my personal beliefs or my conscientious beliefs, my religious or my moral beliefs, I'm just not suited to serve on this kind of a jury. I could serve on a noncapital case, a burglary or a robbery or a murder that didn't involve the death penalty, but I'm just not suited for this type of a case.

Let's say there is a third category that say, I don't believe in it, the death penalty, but if it's the law, I guess my .feelings aren't that strong and I guess I could serve on it.

Or a fourth category that says, I [2022] don't believe in the death penalty and my feelings are so strong that I could never return a verdict that would result in anyone being executed. No way.

Now, I know these are general categories, but do you see yourself falling into one of those four?

A Yes.
Q Which one is that?
A I probably would pick the first one.
Q You do believe in the death penalty?
A Yes.
Q And you say you could serve on the jury?
A Yes.
Q Even though it meant that it might be a tough decision?
A Yes.
Q Even though it meant that, if you answered all three of those questions yes based on the evidence, you know it would result in the execution of this Defendant?
A Yes.
[2023] Q So whatever personal feelings, religious or moral, that you have, you would not have to compromise them; you could serve on the jury and go ahead and answer those questions?
A Yes.
Q Is there any doubt in your mind about that at all?
A I could always tell the truth.
Q That's all you're expected to do. We have to come forth with the evidence to satisfy. you beyond a reasonable doubt and, if we do, you answer the questions yes. If we don't, you answer the questions no. You know that the result

of one or more no answers is a life sentence and those are the three questions that the Judge talked about yesterday that decide life or death.

Now, let me just cover one thing with you. You understand that in the old days, under the old law, the jurors decided on a personal basis. If you heard a fact situation, ,you heard about a defendant and a crime that made you mad enough, I guess, or caused you to feel that way, you would actually vote for [2024] death or life, if you didn't feel that way, or some number of years. Do you see what I'm getting at? It's a very personal decision.

We know that being on a jury, even though you don't make that decision directly, instead you answer the questions, you know that the result is the same, don't you? It could be death or life depending upon the answers?

A Yes.
Q The law expects you to put aside your feelings, your personal feelings, one way or the other and not let them influence your decision. Am I making myself clear?
A Uh-huh.
Q We all know, however, that we're obviously not robots. If I were on a jury, I might have a personal feeling. I might say, well, after I heard the evidence, or you might say, I think this guy ought to die for what he did. I'm not talking about Mr. Miller-El. Let's just talk about an example. You know, you might say, for what he did, I think this guy ought to be boiled in oil, if it were up to me. In any case, I think he ought to die, but when it comes time to answering these three [2025] questions, let's say you look at them in all honesty and find out that we have not satisfied you that one or more of the questions should be' answered yes. In which case, you know, your oath as a juror would require you to answer the question no. Could you do that, go ahead and answer the question no

knowing that it would result in a life sentence and not the death sentence that you personally desire? Do you see what I'm getting at?

A Yeah. I could answer the questions on the basis of the truth, the facts that I felt like were the truth.

Q You see, the flip side of that coin, don't you?

A Yes.

Q Let's say you're on a jury and you say, well, this may be capital murder, but I don't think the guy—you know, if I could vote directly, I don't think the guy should die?

A Yes.

Q But I look at those questions and, yeah, they proved to me that he did it deliberately. Yeah, that's true. I can answer [2026] that yes. I think he probably would commit some criminal act of violence, so I can answer that one yes. And three, I believe it-was unprovoked. Do you see what I'm getting at? Three yes answers in that situation would equal death. Could you put aside your personal feelings for a life sentence and answer those three questions yes knowing that it would result in the execution of that Defendant which would be contrary to your personal desire?

A I still back and say, regardless of my feelings, I would hope that I would not judge him by how I felt personally, that I would judge him by what facts I heard.

Q That's what the law would expect.. Let's shift gears here for just a second and let's talk about a situation that I'm not saying would ever come up, but we have to .discuss it at this time. You 'know capital murder, the type of capital murder that we've alleged in this indictment, as the Judge referred to it and as we call it also, it's murder plus. We have the murder, the knowing or intentional killing of another human being, but no legal excuse or justification. It's [2027] couple with another very serious offense, another felony offense, murder during a robbery, for example, as alleged here. Okay. That's one type of capital murder.

I gather from what you told us, because that's what the law is, that's the type of capital murder you believe the death penalty could be called for depending on the facts and circumstances?

A Right.

Q The other type is murder during a burglary, murder during a rape, murder during arson or murder during a kidnapping, murder plus. Do you understand that murder itself is not a capital offense. But when you commit murder during a robbery, then it goes up to capital murder. Do you see what I'm getting at?

A Yes.

Q Now, let's say that you're on a jury. Just imagine for a second that you're on a capital murder jury. The State has alleged .murder during a burglary, a capital murder. We proved the murder. There's no doubt about it. You don't have any doubt that the Defendant [2028] killed somebody with no legal excuse and no justification for it under the law at all. It 3 was knowing and intentional, but you didn't hear any testimony about a burglary. Do you understand, if that were the situation, if that situation occurred, you could not convict that individual of capital murder for the very simple and obvious reason that we didn't prove capital murder. What did we prove?

A Just regular murder.

Q You got it. That's right. When you find him not guilty of capital murder because we didn't prove that and find him guilty of what we did prove, which was what? You said murder. Well, if that were to happen, you forget all about the automatic life o r death, you see. Those are no longer options for regular murder. The range of penalty for murder is very, very broad under the laws of the State of Texas.

I want to go back to what we were talking about earlier. That is where we're talking about the murder offense. You talk about the range of penalty for murder, not capital m

under, but regular murder, then you [2029] must exclude from your thinking a homicide, in other words a killing, where one person kills another person knowingly or intentionally, you must exclude what I said earlier, self-defense. When you think about murder and the range of penalty, high or low or somewhere in between, you must exclude self-defense because, as I said earlier, if you believe someone killed somebody in self-defense, they've got a right to do that. You have to find someone like that no guilty.

What I'm saying is, I don't want you to be thinking, well, I can give X number of years lower because someone killed in self-defense. If you think someone killed knowingly or intentionally in self-defense, you have to find them not guilty. The same thing would hold true if you thought it was an accident. That's not a lower penalty. That's not guilty. I mean, if the gun went off accidentally, you don't give someone a lower sentence. You find them not guilty.

If you believed someone was insane at the time that they knowingly or intentionally killed somebody, well, that's not [2030] murder either. You find them not guilty. Am I making myself clear?

A Yes.

Q Or if you found, for example, that somebody killed someone in the heat of sudden passion. For example, somebody comes home and finds out that their child had been sexually molested by a neighbor. The neighbor is up the street and he is laughing about it. 'The father flies off the handle, goes into a rage, picks up his gun, goes up the street and kills the neighbor. Well, the law doesn't excuse that, but it doesn't call it murder, either. It's less than murder. It's called voluntary manslaughter, so don't be thinking about that. That's not within the range of penalty. Am I making myself clear?

A Yeah.

Q Now, having set that stage—and I'm just asking you for your personal opinion, all right? If you believe one person

knew he was going to kill somebody, intended to kill, somebody and did it, no insanity, no accident, no self-defense and no heat of passion, what do you think the minimum ought to be, Ms. Boggess, [2031] for that sort of an offense, for that kind of murder, a knowing and intentional murder?

A I don't have any problem with what I think. It's what I believe and I believe that the bible says that person should be put to death. That's in Romans and that's my belief. Whether I want to be the one to decide that is—

Q In other words, in your personal feelings it should be death for knowing and intentional murder; is that correct?

A Right.

Q Let me ask you, ma'am, in that regard, knowing that the range of penalty is from five years to ninety-nine years or life for murder—that's what the law sets out—could you ever—would you ever feel it was proper—could you ever hear any facts or circumstances where you personally would feel it would be proper to assess a sentence as low as five years.for a knowing and intentional murder—

MR. CUNNINGHAM: Your Honor, she—go ahead.

Q I think I'm finished.

[2032] MR. CUNNINGHAM: Your Honor, we would object to the f o rm of the question because it fails to include if she heard the facts and circumstances of that case and she believed that the facts and circumstances called for five years.

THE COURT: Go ahead and ask the question.

MR. CUNNINGHAM: And, Your Honor, I think she should be told what the range of punishment is.

MR. MACALUSO: I think I just did, Your Honor. If I'm not mistaken I did say it was five years to ninety-nine years or life, didn't I?

Q That's what the 1:aw says, that the range of penalty for murder is five years to ninety-nine years or life. The law

expects a juror, if he can to tailor the punishment somewhere in between there. Let me just as you, do you personally feel—you know, that's why you're here. we're asking you.

[2033] A Let me explain something.

Q Sure.

A You know, my feelings about the law and my feelings about what the bible says about what the law does. I feel that, you know, the bible says that I should be under the government, the rule of the government. However, it says also to me that the rule of the government should be a biblical rule and if the rules of government are not biblical, then I'm not supposed to follow that, but follow my own beliefs biblically. I'm having difficulty with the fact that what the law decides is not biblical principle, but yet I'm still under the law. Not that I'm going to break the law, but I don't want to be. a part of that particular—I don't want to go with the law just because it's the law, just because you say he should get five to ninety-nine or he 'should get death, because of this or the other, when the bible says, no, that's not the way I want it. Do you understand what I'm saying?

Q I think I understand what you're saying. You said personally you would vote for death. You think a person ought to receive the [2034] death penalty for that; is that correct?

A I'm saying that my personal beliefs, because I'm a Christian, says that, if someone commits a murder, then that's what the bible says. Whether or not the law says it, you know, is something different because—you've decided what you're going to do. You know what I'm saying? The law has decided, now I'm supposed to follow the law, but only if the law states what is biblically right.

Q That's why we're going through and asking you all these questions. I'm out of time right now. The Judge has very graciously allotted us a specific amount of time, but I just want to ask you this last question. It's kind of a difficult question to ask.

Knowing yourself and knowing how you feel in your heart and in your mind and spiritually, for that matter, do you feel, ma'am, that there would ever be any facts and circumstances where you feel it would ever be proper or justified, that you could ever under any facts and circumstances, feel that a five year sentence, you could ever consider and actually vote for a sentence as low as five [2035] years, for the knowing and intentional taking of another human life without any legal excuse or any legal justification whatsoever? Do you :ever feel it would be proper under any circumstances to vote for that sort of a low sentence?

A That's tough. I may—

Q You know, we have to pin you down on that. I know you haven't heard any facts. We can only go as far as we have. You've just got to search your heart and your mind. Just tell us how you feel. Do you feel you could ever—you would ever feel it proper under any facts and circumstances where you would be able to vote for as low as five years in the Texas Department of Corrections where one person knowingly and intentionally killed somebody, commits murder, without any legal excuse or any legal justification whatsoever regardless of the facts?

A I'd have to say yeah. I'd have to say that I may do that. It just depends on where my heart was and how my faith—and what I had prayed about and how God had answered my prayers. You know, even though He says death [2036] sentence for everything, the Lord does do different things at different times. He doesn't always kill everybody just because someone else kills them, so I couldn't say that.

Q Again, I regret this, but I'm going to have to pin you down at this point. It's either yes, you feel you could or you could not.

A I feel I could.

Q Do you have any questions at all of me, Ms. Boggess?

A No.

Q Do you know of any reason, whether we've touched on it or not, why you could not be a fair and impartial juror in this case?

A I don't think I could ever not be fair or impartial. I don't think I could ever not be fair and impartial, but I wouldn't want to serve on it, though, but that's my true feeling.

Q You've been very polite, ma'am, .and very kind to us and very attentive and I appreciate it.

MR. MACALUSO: Your Honor, [2037] I'll pass the prospective juror.

THE COURT: Thank you, Mr. Macaluso. You have five extra minutes if you need it.

[2038] EXAMINATION

BY MR. CUNNINGHAM:

Q How do you pronounce your last name, please?

A Boggess.

Q Ms. Boggess, my name-is Cunningham and to my immediate left is Mr. West. As Mr. Macaluso indicated to you, we have been appointed to represent Mr. Miller-El in this case. Just briefly I would like to ask you a few questions because I think you have answered their questions and based upon the law, you're qualified as a juror in this case.

On your information sheet for religious preference or your church, OCB, is that E or F?

A F, Oak Cliff Bible Fellowship.

Q Where is that located?

A It's on Camp Wisdom in Dallas.

Q I've been trying to figure in my mind where your husband works in the district clerk's office. Is his hair sort of salt and .peppered?

A Yes. He is crippled.

Q Oh, he works in the back. I've [2039] known him a long time. This is for the purpose of the record. What is your race?

A Black.

Q She's taking down everything you say and unless we ask you, it's not in the record. Do you teach Sunday school?

A Yes.

Q You're a member of the Visiting Nurses Association?

A Right. I'm a therapist.

Q Do you know Etta Bernice Johnson?

A Uh-huh.

Q How long have you known Etta?

A I don't know her personally. I just know her name.

Q She is also a member of your association?

A Yes.

Q You live at 5717 Fox Hill Lane?

A Right.

Q How long have you and your husband and children lived there?

A Almost eight years.

Q Are you and your husband buying your home there?

[2040] A Yes.

Q Two of them attend public school?

A Yes.

Q Is it public or private?

A Public.

Q Where does Ke'Andra go to school?

A Atwell Junior High.

Q And your son goes to school where?

A Turner. All three of those are boys.

Q Have you taken any other courses above your BS degree?

A No.

Q You don't remember what security agency your husband used to work for?

A I think it was Preston or something like that. I don't know if they're still in business.

Q What did he do for them?

A He rode the Surtran buses and monitored the bus drivers.

Q You've never had any criminal jury service?

A. No.

Q How many times have you been [2041]called down?

A I don't know. I've only served once.

Q At least one time you served on a civil and while—or you took a recess and they settled it?

A Yes.

Q Ms. Boggess, you understand that in a criminal case, the State of Texas has the burden of proof in a case. That's these gentlemen over here?

A Uh-huh.

Q If you were chosen as a juror in this case would you hold them to their burden of proof?

A I beg your pardon?

Q The burden of proof is on the State to prove its case beyond a reasonable doubt. The law says that, if they do not prove their case beyond a reasonable doubt, the jury should find the accused not guilty. My question to you is, if they failed to prove their case beyond a reasonable doubt, would you have any problem with finding the accused not guilty?

[2042] A No, not if they didn't prove it.

Q In other words, if they don't prove it, guilty. That's what the law expects and you that?

A Yes.

Q I'm not confusing you, am I?

A No.

MR. CUNNINGHAM: Pass the juror, Your Honor.

MR. MACALUSO: The State will exercise a preemptory challenge, Your Honor.

THE COURT: Okay. Ms. Boggess, you'll be excused from service in this case.. We appreciate your attention down here today and your patience with us and tell Joe hello for me, would you? He's been a witness up here a few times. Have a good day.

(Whereupon, Ms. Boggess left the courtroom, after which the following proceedings [2043] were held.)

THE COURT: Go ahead, Mr. Nelson.

MR. NELSON: The State would like to put in the record at this time the following reasons for exercising our preemptory strike for Ms. Boggess: Number one, she stated that she wasn't sure she could actually give death and, as a matter of fact, because-of the big decision in this case, she did not want to serve on this jury. It is my understanding that the Court is also placing the questionnaires in the Court's records. I would like to call the attention of the Court to where Ms. Boggess said she was a defense witness for her nephew who was evidently charged with stealing at one time. It is for those reasons that we chose to exercise our preemptory strike on this juror.

MR. CUNNINGHAM: Ordinarily, [2044] Your Honor, I probably would not say anything, but since the State is putting into the record that alleged reason for striking Ms. Boggess, I would point out to the Court that of the five blacks that have qualified all five have been struck, by the State, those being; Roger R. Bozeman, number seven; Billy J. Fields, number nine; Hilbert Gitchaway, number seventeen; Virginia R. Smith, number nineteen; Joe A. Warren, number twenty-eight and now Ms. Carrol Boggess, who they just struck.

THE COURT: She was number forty?

MR. CUNNINGHAM: Number forty. Joe A. Warren is number twenty-eight.

THE COURT: Let me tell you what my records show.

MR. CUNNINGHAM: Did I say Virginia Smith—Bozeman, Fields, [2045] Gitchaway—no. Gitchaway was by agreement. I'm sorry.

Bozeman, Fields, Warren, Rand and Boggess.

THE COURT: Let me make sure that the record is clear. I show that Mr. Bozeman

MR. CUNNINGHAM: Was their first strike.

THE COURT: I think that's probably correct. We've had several blacks either excused by agreement or for cause. Let me clarify something because I do remember now that we agreed or it should be clear that we're going to put into the-Court's file any questionnaires of any the State's strikes because I can go back and get them in there. I don't know if I've got all of them in there right now or not.

REPORTER: I have them.

THE COURT: Mr. Cunningham, to make sure that the record is in [2046] the shape that you-all want it for any reason, will you make sure at some point after voir dire that Ms. Bardwell has the questionnaires of all the jurors that you want in there? I' sticking some in the file as we go, but I prefer to let the court reporter keep track of that, if you-all wouldn't mind.

Let's bring in the next juror.

(Whereupon, these proceedings are continued in Volume V.)

* * * *

[2170] WAYMAN A. KENNEDY,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth And nothing but .the truth, was examined and testified as follows:

EXAMINATION

BY MR. NELSON:

Q Good afternoon, Mr. Kennedy. I want to start out by reintroducing everybody who is sitting here. You met almost all of us yesterday. My name is Jim Nelson. The gentleman seated next to me is Mr. Paul Macaluso and the gentleman seated behind me here is Mr. Norman Kinne. The three of us are assistant district attorneys here in Dallas and we've been assigned by Henry Wade, your elected district attorney, to handle this case for the State of Texas.

The man immediately to my left is Mr. E. Brice Cunningham.

MR. CUNNINGHAM: How are you, Mr. Kennedy?

Q Next to him is Mr. Royce West.

MR. WEST: Good afternoon, Mr. Kennedy.

[2171] Q These two gentlemen have been appointed by Judge McDowell to handle the defense of Thomas Joe Miller-E1. He's the man down at the far end of the counsel table. I think you can see him if you lean forward there.

As you know from yesterday Mr. Miller-E1 is indicted and charged with the offense of capital murder. That's the most serious criminal offense anyone can be charged with in the State of Texas. Now, Mr. Kennedy, I don't believe from looking at your sheet that you've been on jury- service before; is that right?

A That's correct, I haven't.

Q Now, if you remember yesterday we were in here and you were in a group of about forty people out there. On most normal cases you would have remained in the group like that for us to talk with you. we would have asked you some questions out there and pointed some things out to you in front of the group. Because this is a death penalty case and it

is penalty a situation where people have very strong feelings on both sides of some of these issues [2172] that we're going to talk about, the law allows us to talk to you individually like we're doing here. I think the hope is that, if you're in here by yourself, you will be able to to be a little more comfortable and a little more open with how you feel about things than you would be if you had to talk in front of forty or fifty other people who are sitting out there.

What I would like you to do is the same thing the Judge told you to do and that is relax just as much as you can. Remember that there are no right or wrong answers to anything I'm going to ask you or these gentlemen may ask you. We're just trying to find out how you feel about some things.

Now, Mr. Kennedy, we've talk to—you're the forty-second person o rforty-third person we've talked to in one way or another on this jury. At this time we have three jurors. You can see that it is a rather tedious process, number one, and the great majority of the people, for one reason or another, have not been suited to serve on this particular jury. We're going to talk to you about some things that you may or may not have some strong [2173] feelings about and I hope when you do have, you will express those. I hope, if I talk too fast or say something that isn't clear or you have questions, I hope you will stop me, so we can get those cleared up while we're talking here today. I want to be sure we're understanding each other on what we're talking about.

A All right.

Q If you will bear with me, here we got. Now, Mr. Kennedy, I feel like it is only fair that you know from the outset what the position of the State of Texas and our office is in this case. We are actively seeking the death penalty for that man sitting right down there, Thomas Joe Miller-El. We feel like we will be able to present twelve jurors, to you if you're on that jury, the type and quantity of evidence to convince a

jury to find Mr. Miller-El guilty beyond a reasonable doubt of capital murder. We further anticipate that we can present sufficient type and quantity of evidence to have a jury answer those three questions that you see on the boards yes.

If those three questions are answered yes, each one is answered yes, it [2174] results in the death penalty as a matter of law. There is no option. The Judge doesn't have an option to do anything different. Three yes answers equals the death penalty. We anticipate—

A – The jury is the one, if they answer the questions correctly, the Judge cannot change it?

Q That's correct. The Judge has no option whatsoever. If the jury comes back and answers each of those questions yes, yes, yes, Judge McDowell has to, under the law, and is required to assess a death sentence for Thomas Joe Miller-El. If one of those questions is answered no, then a life sentence is assessed. The Judge has no option whatsoever in either case. We anticipate, Mr. Kennedy—being very open and honest about it—if those three questions are answered yes, at some point Thomas Joe Miller-E1 will be taken to Huntsville, Texas. He will be placed on death row and at some time will be taken to the death house where he will be strapped on a gurney, an IV put into his arm and he will be injected with a substance that will cause his death and [2175] his life as the result of the verdict in this case if those three questions are answered yes.

I feel like it is only fair to you that we're clear about it and you know where we're coming from on this thing and that's why I tell you that so you know what you're dealing with because I would guess coming in yesterday most people feel, well, maybe I'll get on a civil case or I'll be on a little theft case or something like that.

A Yes. That's the normal feeling.

Q And then you walk in and you get hit with a capital murder, I would guess it's a little bit of a surprise, a little bit of a shock?

A Yes.

Q You did have a chance yesterday to fill out a questionnaire. I know everybody was in and out of the courtroom and back and forth and in. the hall and back in the courtroom and so o-n, so you didn't really have a whole lot of time to sit down and concentrate on answering the questionnaire, but there was one question on there about the death penalty. You answered it, but you've had a chance to sleep in it a [2176] little bit, to give it some more thought, I would guess, since then. Would you just tell us in your own words, if you would, how you feel about the death penalty and whether it serves a purpose in our society today?

A Well, my feelings are kind of like what I said on the questionnaire, that I really don't believe in it only in extreme cases and I would say like a mass murder. Someone broke into this courtroom and killed all of us, I would say yeah, put him to death because that would be a mass murder type situation or in a situation where it was a mutilation, where they come in and cut the body all up or something like that. Normally I wouldn't say on just the average murder case—I would say no, not the death sentence.

Q Okay. Well, let me just take a couple of minutes to explain a little bit about the Texas law with relation to the death penalty. The death penalty is an option in Texas only, in cases of what we call capital murder. That's murder, number one, but murder in a special situation. For example, if a certain class of persons is killed, murder of a [2177] police officer or a fireman on duty, a prison guard, something like that, or a murder for hire fits in there. Second is one that you mention, a mass murder like the incident' we had here a, year or two ago. The third one is what we're dealing with here, Mr. Kennedy, and is something we call murder plus, for lack of a better name, I guess.

We have to prove, number one, that the individual committed the offense of murder but that he did that while in the course of committing or attempting to commit another offense, burglary or robbery or rape or arson, for example. Specifically in this case we're talking about murder in the course of a robbery. Now, the law in the State of Texas says that the death penalty is appropriate in those cases. It can be considered in those cases.

I guess what I would like to know from you, first off, Mr. Kennedy, based on what you just told me, do you feel like the death penalty should be appropriate in cases like that or are those not serious enough?

A The circumstances around it, or [2178] are you saying a small—you know, what type of robbery was it? Was it a small robbery like where he held up somebody in a back alley or something and shoot them because they won't give him their money or are you talking about like a bank holdup where you shoot an armed guard or what?

Q I'm not allowed, Mr. Kennedy, under the law, to go into any of the facts of this case. None of the lawyers can and the Judge can't at this point.

A So that is the kind of thing that would weigh my decision as to why a person should be put to death for shooting someone during a robbery. To me, it would like, if it was just a normal robbery, why wouldn't a life sentence be enough and make sure that person never comes up for parole.

Q I'm sorry. I didn't hear what you said.

A I said like a life sentence where they wouldn't never come up for parole. If the crime was severe enough—well, I have a question and a statement. Some people are put into prison with never coming up for parole, [2179] right, and some life sentences still come up for parole in like twenty years or something like that, right?

Q I can't go into the parole laws or anything having to do with that.

A That's what I'm saying. My opinion would be just like lock them up and he would be without ever coming up for parole. It would be a life term sentence.

Q Let me go just a little bit farther and see—I can't go into the facts of the case, but let me go a little bit farther and see where we wind up. If a person is convicted of capital murder—and we've alleged basically this in the indictment, Mr. Kennedy; That this Defendant did knowingly or intentionally cause the death of another individual and that he did it while in the course of committing or attempting to commit robbery—That's not word for word, but it-'s basically what the indictment says. If you as a juror or if the jury convicts a man of this offense, capital murder, there are two possible punishments under the law, life—and that life sentence is subject to the same rules and [2180] regulations and considerations and restrictions as any other life sentence in the State of Texas, all the same, or a death sentence. Those are the two options. If he is convicted of capital murder, it goes to only those two options. That's what we're dealing with. That's about as far as I can go without going into the facts.

The law in the State of Texas says the death. penalty is appropriate for consideration in this type of case. In order for a person to be qualified to serve as a juror, they have to be able to understand that and not have such problems with it that it would affect their deliberations in the case.

Now, what is going to happen in the procedure basically is this: This trial is what we call a bifurcated trial. There are two stages. First of all, there "is the guilt, or innocence phase of the trial. It's at that point that we have to prove to you, number one, that the Defendant committed the murder and we have to go further to prove that he committed that while in the course of committing a robbery or attempting to commit a robbery. Am [2181] I clear with you so far?

A Yes.

Q If we prove that to you beyond a reasonable doubt, the it is your duty as jurors and as a jury to find the Defendant guilty of capital murder. If we fail to prove that to you beyond a reasonable doubt, it is your duty to find him not guilty or, if we prove some lesser offense, to find him guilty of that depending on what the facts show.

A That's understandable.

Q Assuming that he is convicted of capital murder, then we move to the second phase of the trial, that being what we call the punishment phase of the trial. Now, under the old law, up until about twelve or thirteen years ago or something like that, the jury on a capital murder case listened to the evidence and went out into the jury room, took the verdict form and they put life or death and it. That was the verdict. Again, the Judge had no discretion. If the jury said life, he got that life sentence. If they said death, he got the death sentence.

[2182] Today the legislature has done things a little bit differently. They have set out three questions that must be answered. After hearing all of the evidence, you as a jury, if you're on that jury, will be asked to answer those questions either yes or no. Why don't you take just a minute to look at those questions and read them over?

A (Juror complies.) Are the blanks left for the name?

Q Those will be names, yes, sir. Have you had a chance to read those over?

A Yes, sir.

Q Now, I don't know why the legislature in their wisdom set up the questions rather than just asking the jury to write life or death. The thing I want you to understand, Mr. Kennedy, if the effect is the same. If the jury answers those three questions yes, he gets the death penalty, period, end of story. That's it. We anticipate, if those three questions are answered yes, at some point this man sitting right down here will have his life taken by the State of Texas. If one of those

questions is [2183] answered no, he gets a life sentence. Again, there is no option. It's that same life sentence that we talked about.

Now, you've indicated that you have a real question whether you feel the death penalty is appropriate in this type of case, a murder plus a robbery.

MR. CUNNINGHAM: Your Honor, we'll object to that statement. That is an improper statement of what this prospective juror has said.

THE COURT: I'll overrule that. I think Mr. Kennedy understand the question. Mr. Kennedy, let me tell you, if you don't understand any question the lawyers ask or want it clarified, please let us know. I'm counting on you to do that. Go ahead.

A Repeat the question again.

Q Okay. Mr. Kennedy, first of all, let me say one thing. There is no way I want to or would try to put any words in your mouth or argue with you or force you to say anything [2184] that isn't what you feel or what you believe. So if I misstate something or if I say something you don't agree with, I hope you will tell me. I think you're strong enough that you if I say something wrong.

A I Will.

Q Okay. I thought you told me that you had some questions or some reservations about the death penalty being appropriate in this type of case; is that right?

A That's right.

Q Okay. First of all, let me tell you this: I think I told you that we've talked to about forty-two or forty-three people or something like that and we only have three jurors at this point. The people that we have excused or the-people who aren't suited to serve on this jury aren't bad people. If you sit on the jury, you don't get brownie points and if you don't sit, you don't get any demerits as far as citizenship or anything

like that. It's a difficult case. There are going to be difficult decisions to be made and what we're looking for is twelve people who can follow the law and make those decisions. If [2185] somebody can't do that or would have problems doing that, then we don't want to force them to sit on the jury.

A This, I understand. I can understand that because what you're saying is, you don't want somebody who has already formulated an opinion before the trial even starts.

Q Exactly.

A That's just like what I was telling you. The reason my thoughts are different for the death penalty versus a life sentence may be because I haven't heard the evidence on it. That's the reason I said that mine are different on the situation, the way I look at it, the way I would feel.

MR. WEST: Mr. Kennedy, would you speak into the microphone. I can barely hear you.

A As I was saying, it would have to be like the circumstances—I would have to see—you know, before I form a complete conclusion as to what because I don't about people, but myself, before I would say I would [2186] go along with the death sentence in some cases and some cases not, as I stated briefly on that, mass murder or something, yes. It also depends on how much—someone else in another situation might give a life sentence. That's the only thing that I'm saying.

Q You're right, Mr. Kennedy. We want twelve people that have an open mind sitting over there. We don't want, and we're not going to have, twelve people over there frothing at the mouth and jumping up and down to execute somebody. That's not what we're going to have on this jury. By the same token, we need twelve people who can realize that they're going to make a decision with reference to these questions and can make those decisions without being affected by their personal feelings about whether the law is correct or not or their—if they don't feel that the death penalty is appropriate

in this type of case, then they have trouble, a person would have trouble answering those questions one way or the other. We want twelve people who can answer those questions and make those decisions and handle that without reservations. Whether [2187] the questions are answered yes or no, they can make that decision.

I know you're in a difficult position because we can't tell you what the facts are and we aren't allowed to because you have to hear them from the witness stand.

A I can understand that.

Q If I told them, Mr. Cunningham or Mr. West probably would tell them a different way and none of that is evidence. The evidence comes from up there, so we can't even go into an example of what some facts might be. Understanding that we're dealing with murder in the course of a robbery of one individual, an individual by the name of Douglas Walker in this particular case', but one individual, he's killed while in the course of committing a robbery, is, in your mind, the death penalty appropriate for that type of case, understanding that you don't know the fact's of this case, but for this type of case, the death of one person during a robbery?

A There again, you're asking me something—it's kind of hard to say because one thing, you would have to formulate an [2188] opinion and my opinion would be—for one thing, I don't know all the facts. I guess what the law is saying—the state law says that it is okay to do it because you said that the state law says that a person can be pit to death for doing it, so are you saying what are my feelings of the law or what?

Q I want to know—we know what the law is. I want to know how you feel, what your personal feelings are.

A To me, it would depend on the circumstances.

Q Okay. We don't want to force someone, Mr. Kennedy, to take an action or to enforce a law that they have strong feelings against or that they don't agree with.

A As I stated earlier, if the circumstances around the situation were presented the way that I feel would warrant the death sentence, I would say yeah, but it also depends on the circumstances.. I would have to see more to say yes because I do have reservations about it.

Q You looked at those questions a few moments ago and read over them. [2189] Understanding that a yes answer to each of those questions results in a death sentence—

A Because you said—I know deliberately—and just picking something out of each one—you think they would commit another crime—I would say yeah because that person, if they was committed to a life sentence, you're not going to let them go back out into society, anyway, again, so the death sentence probably would be okay.

.REPORTER: I didn't get that last remark.

A I said the death sentence probably would be okay because, if you're going to put a person away forever and if the crime was bad enough, then I would say yes, the death sentence would be all right.

Q Let me go a little bit farther and ask this: I told you that the legislature put. those questions in rather than just have the jury write life or death. If you were on the jury and you, after hearing all the facts, felt that this man did not deserve the death penalty, those were your personal feelings, and nevertheless we have proved to you that a yes [2190] answer should be given to each of those three questions, could you give a yes answer to each of those three questions knowing it would result in the death sentence even though your personal feelings were that the man should get a life sentence?

A I don't know. It would depend on the evidence.

Q We have to prove to you that those questions should be answered yes and that burden of proof is here on this table and stays here. We have to prove it to you, but assuming we proved to you that the answer to those questions should be

yes, even if your personal feelings are such—you know how when you hear about something or you see something or you listen to something, you tend to get personal feelings, well, this ought to happen, an emotional or gut reaction type feeling. If your gut reaction and your emotional feeling is that the man deserves a life sentence and should not be executed, but nevertheless we prove to you that the answers to those questions should be yes, could you and would you answer them yes knowing it would result in [2191] the death sentence even though that's contrary to your emotional or gut reaction?

A Yeah, if it was proved, like I say, without a doubt. You have got to prove it without a doubt.

Q Now you said "without a doubt."

A What I mean is, the evidence has got to be convincing enough.

Q Beyond a reasonable doubt?

A Yes.

Q On TV you hear beyond a doubt—

A That's right, but that's basically what I'm saying. The evidence or whatever you would present would have to be convincing enough.

Q If we convinced you beyond a reasonable doubt, you could answer those questions yes? Even if you didn't personally or emotionally want to give him the death penalty, you could answer those questions yes?

A Yeah—you said personally?

Q Right.

A Yes.

Q In other words, your personal and emotional reaction is this guy does not deserve [2192] the death penalty. He deserves a life sentence not the death sentence. We proved to you that those questions should be answered yes, could you answer them yes?

A It's kind of a contradicting statement. You're saying would my convictions that I believe that it should be a life sentence, but then you say you proved to me that—could I

state the death sentence and answer those questions yes. Those are kind of contradicting statements.

Q They sure are, but that's why the questions are there. The legislature—I don't know what their reason—maybe they wanted to put a buffer in there between a person's emotions and the actual verdict. What the legislature has said is that those questions should be answered based on the proof. What I need to know from you, Mr. Kennedy, is, if those questions are proved, a yes answer to those questions is proved, could you answer them yes even if you personally felt that the man should get a life sentence rather than the death sentence? You know, if you were just going to write on the verdict form life or [2193] death, you would write life?

A Uh-huh.

Q But we have proved that each of those should be answered yes. Could you nevertheless answer them yes?

A Yes, I believe so.

Q You think you could?

A I think I could if it was proven.

Q We have to prove it to you.

A It's got to be proven.

Q Okay. Now, when we're talking about proof, one other thing that may come up in this case—we don't anticipate that it will, but it may. You remember I told you that we call this a murder plus. For simple murder in the State of Texas, the death penalty is not appropriate under the law. It's not a consideration. If we prove to you that the person knowingly or intentionally caused the death of another human being, the death penalty is not appropriate. It's a different situation.

We talked about murder and there is no first degree, second degree or third degree murder in Texas. It's just murder. [2194] What that is, is knowingly or intentionally causing the death of another individual. We aren't talking about self-defense. If it was self-defense, the person would be not guilty. If it was an accident, the person would be not guilty. If it's a

killing in the heat of passion—for example, you have some children and I have a little four year old girl. If I came home and found out somebody had raped my little four year old girl and the guy that did it is standing down the street laughing about it, I might very well take a gun and go down there and do a little justice of my own in that situation.

A I can understand that.

Q A killing in the heat of passion, that's not murder. When we talk about murder in the State of Texas, we aren't talking about insanity. If a person is insane, they're not guilty. We're talking about the knowing or intentional taking of another human life without any legal justification or excuse whatsoever. The guy knew he was going to do it and he intended to do it and did it without any legal justification or excuse whatsoever.

[2195] Now, the maximum sentence for something like that is life under the law. Can you give me an idea of just your personal feelings what you feel a minimum sentence should be for the offense of murder the way I've set it out for you?

A Well, to me that's almost like it's premeditated. But you said they don't have a premeditated statute here in Texas.

Q It's either murder, knowing or intentional taking of a human life or it's not murder.

A A person just plans to go out and shoot someone, you know, like I go out and shoot the first person I see or I shoot the first black or white or something like that, you go out and shoot someone like that, that person, I'd say, the minimum would be life because they shouldn't even be in society.

Q Okay. I'm not quite sure how' to go from here,, but murder can come up in a variety of situations. You would agree with me on that?

A Yes.

Q Again, we're not talking about [2196] self-defense or accident or insanity or killing in the heat of passion or anything like that. We're talking about the knowing—

A I know you said the minimum. The minimum amount that I would say would be at least twenty years.

Q For the taking of another human life?

A Yes.

Q Without any legal justification or excuse?

A At least twenty years with no parole.

Q And no parole in it?

A Right.

Q Okay. Mr. Kennedy, could you—again, for the knowing in intentional taking of another human life without any legal justification or excuse,, no matter what the facts and circumstances were—again, we're not talking about self-defense or accident or killing in the heat of passion. We're talking . about murder. Could you under any set of circumstances, no matter what the facts and circumstances were, ever assess, actually give, [2197] a five year sentence?

MR. WEST: Your Honor, I would ask that sentence be completed, if he felt as though a sentence of five years would, in fact, be warranted, if he felt in his mind that it would be warranted.

MR. CUNNINGHAM: Your Honor, we would also further object that the State has not advised Mr. Kennedy that the statute in Texas provides that the minimum punishment is not less than five or more than ninety-nine or life. I think it is an unfair question to this prospective juror to ask him about a five year sentence and not tell him that the statute says he can give five years.

THE COURT: I think his question included that five year. minimum, but reask the question, Mr. Nelson.

Q Mr. Kennedy, basically what I'm [2198] asking is, I want to know your personal feelings. We've talked about, through this whole thing, your personal feelings. That's what we're interested in. Could you—and I'm not going to go back through the whole thing again—for the knowing and inten-

tional taking of another human life without any legal justification or excuse, under any facts and circumstance no matter what they were, give, assess—if the law allowed you to give five years and it -was proper to give five years, could you ever give five years?

A Here again, like I say, it depends on the circumstances. I know I probably wouldn't, no. Right off my head I would say no.

Q Okay. No matter what the facts and circumstances showed?

A You know, you're saying just straight out and out, yeah, but if it was something different like where he had maybe—you know, in the heat of passion or self-defense or something. If it wasn't that at all, it was just an out cold-blood murder, then no. I would say at least twenty years.

[2199] Q Again, if it's the heat of passion, it's not murder. That's what we call voluntary manslaughter.

A Okay, but that's still going to carry some time with it, isn't it

Q Sometimes, but we're not even talking about that. We're talking about something more than that. We're talking about murder. We aren't talking about self-defense. We aren't talking about accident. We aren't talking about the heat of passion. We're talking about murder, knowingly or intentionally taking another human life. You're telling me that you would give twenty years and could not give five years; is that correct?

A Right.

Q I'm not misstating that, am I?

A No. Like it's cold-blooded murder, I would say at least twenty years—

Q Obviously you feel like human life is valuable and human life is precious?

A Yes.

Q That's the minimum value you would put on a human life; is that fair?

[2200] A That seems fair enough because the way I feel like, anyone take another person's life and it's not self-defense and it's just cold-blooded murder, then that person should at least be removed from society and at least take away twenty years of their life by taking them out of society.

Q Okay. Twenty whole years?

A Yes.

Q You made the comment earlier, no parole, but twenty years?

A Right.

Q Twenty calendar years—

MR. WEST: Your Honor, I'm going to object at this time. The Court has called time and Mr. Nelson is continuing to ask questions.

THE COURT: Well, I've given both sides a little leeway. Mr. Nelson, your time is to a close, so bring it to a close.

Q Mr. Kennedy, my time is over and I appreciate the Judge being generous with me and letting me talk to you for just a couple more [2201] minutes, but I feel -- I've tried to explain this as best I can. Do you feel like you understand what we've been talking about here?

A Yes.

Q I take it from what you've said, this is something you feel strongly about, is that right, and I could sit here and argue with you and argue with you and I'm not going to change your mind; is that --

A That's right.

Q I don't want to do that.

A I didn't think that you were trying to.

Q I'm just trying to find out how you feel and I don't think any of us here has a right to argue with you about how you feel. None of us is doing that and none of us is going to do that. I wanted to be sure that we're clear and you've told me that you feel like we're clear and understand what we've been talking about.. I appreciate very much your time and I

appreciate your patience with me in talking with me and being forthright and honest in your answers. I believe we wouldn't change your mind and I don't have any reason to think [2202] that you will. I'm not going to bother you any more. Mr. Kennedy, I thank you very much for our patience with me.

MR. NELSON: Your Honor, I'll pass the potential juror

[2203] EXAMINATION

BY MR. WEST:

Q Mr. Kennedy, as Mr. Nelson said, my. name is Royce West. I need to talk with you a little bit to make sure that you really understand what's going on.

Now, how many times have you been called down to serve on a jury?

A This is my second time.

Q You didn't serve the first time?

A No. The first time, when I came down, we were called up like we were yesterday, but the trial settled out of court, so they told us at that time, as far as they were concerned, we had served.

Q And you went on back home?

A Right.

Q Now, let me explain something to you. Mr. Nelson told you at the beginning that you're the forty-third person that we have talked to. Now, in a capital murder case each side has fifteen strikes that they can use for any purpose that they want to. When I say strike, I'm not talking about physical strikes. They can say, no, I don't want this person. [2204] They can do that fifteen times. Now, they can say I don't want this person and they don't even have to give a reason, if they don't like the way they part their hair, if they don't like the color shirt they have on, the color of their suit.

Now, both the State and the defense have that option. Some of those strikes have, in fact, been used in this particular case. In fact, the State has used eight and the defense has used six, so that's fourteen strikes that have been used for some purpose or another. Do you understand what I'm saying?

A Uh-huh.

Q Okay. Now, the only issue that we really need to address—and no one is asking you to make a decision until you hear the facts of the case. The law requires that, in order for you to be qualified to sit on this jury, you have an open mind. From listening to your responses, I believe that's what you're saying, that you would have an open mind; is that correct?

A Yes.

[2205] Q Now, sir, would it be a fair statement to say that, if you took the oath and the oath being that you would a true verdict render based on the law and the evidence -- would you do that?

A Yes. Well, the evidence and the law, but the evidence being the main thing.

Q The evidence being the main thing?

A Yeah.

Q But you've got to stay within the confines of the law, too?

A Well, yes.

Q The Judge says that it's a theft case, for example, that a person commits the offense of theft where he knowingly and intentionally takes someone else's property without their consent, in order to find that person guilty you would have to listen to the evidence and make a determination as to whether or not you believed the evidence and if you believed the. evidence, you could follow that oath; is that correct?

A Yes.

Q If you didn't believe it, you could say that the person is not guilty?

[2206] A Right.

Q Okay. The same thing applies to punishment. Now, Mr. Nelson asked you initially what's the minimum that you could give a person for first degree murder, knowingly and intentionally taking someone's life without any legal justification or excuse. I believe that your response, sir, was twenty years?

A Yes.

Q At that time you did not know what the range of unishment was that the law provides, did you?

A No, I didn't.

Q Now, understand that the legislature, the people that we elect down in Austin, have set that range of punishment and that range of punishment has been in effect ever since I've been a lawyer and I've been a lawyer for some six years. Now, obviously if the range of punishment is from five years to ninety-nine year or life, there is a reason that they did it and that's because there is a broad range of facts and circumstances that would necessitate a minimum of five years [2207] all the way up to life and an optional fine of $10,000.00. Would you agree with that?

A Yes.

Q Now, the law says that, if you hear evidence that you feel as though warrants the maximum of life, in order to be qualified as a juror, you have to tell the State that, if I hear those facts and circumstances and I feel as though it's proper in my heart, I feel as though it is proper, I can give that person the maximum of life. Can you do that?

A Yes.

Q The law also says that you have to be able to tell the defense that, if you hear the facts and circumstances and you feel as though it's proper in your heart, you would be able to consider and, under the proper facts and circumstances, give the minimum of five years. Can you do that?

A Now, saying that you're on the jury and there is twelve people on this jury, right?

Q Yes, sir.

A One person—and let me say it was myself—say that I said—say the case [2208] come out to where it could be the minimum. Say that I wanted twenty. My one against eleven—

Q Now, the minimum is five.

A I know that. That's what I'm saying, see. I'm saying twenty and they're saying five. My one against eleven, what would that mean?

Q In a situation such as that, the Court will tell you basically you are to intelligently and honestly deliberate and try to reach a verdict if it doesn't do you any harm.

A Every one has to agree on the same amount of time?

Q It has to be a unanimous verdict, yes. Now, again, the law only requires --we're not asking you to commit to giving anybody five years. The only thing we're , asking you to do is to have an open mind, to listen to the facts and if you feel as though the facts are warranted, if you feel as though the facts warrant a minimum of five years, you be able to have an open mind and be able to give five years, if you feel as though it is warranted. Do you understand what I'm saying?

[2209] A I understand what you're saying.

Q Now, can you do that?

A It would greatly depend on the facts because here again you're coming back to the law. You know, you keep putting that against my personal opinion and the law. Now, like you say, the law has a minimum of five. What I think, my personal feelings, but here again I'm only one.

Q It would depend upon the facts, right?

A Yeah.

Q If you felt as though the facts warranted five years, you would be able to give five years and if you felt as though it didn't warrant five years, you would be able to give twenty, thirty or all the way up to the maximum, but you would have to listen to the facts first?

A You would have to listen to the facts. But also, when you—like I say, here again, I always think about a jury is you

have a number of people. You're not only taking one person's complete—you're looking at eleven other people all total?
[2210] Q That's correct.

A Like you-said, they've got to come to a unanimous decision and somewhere in there, it.'s going to be some concession.

Q Exactly.

A There's got to be some concession between the members of the jury.

Q Okay. See, each juror that is selected in this case or any case, whether it be down in municipal court where the maximum is a $200.00 fine, in order to be qualified you must say—and not only say, but you must be able to consider and, under the appropriate facts and circumstances, be able to assess the minimum all the way up to the maximum. Nobody is asking you to commit to anything. I'm not saying, hey, if you were on the jury, give my client the minimum. I'm saying be objective and keep an open mind and be able to consider and, under the appropriate facts and circumstances, be able to assess the minimum if you believe that the facts warrant that particular penalty. Each juror that serves would have to be able to do that. Again, no one is trying to pin you down. We just want to [2211] make sure that you're qualified for the whole range of punishment.

Now, you said this was your second time down here. There is an infinite number of examples or situations. That's why the range of punishment is so broad. The legislature has set this range of punishment and obviously when they set this range of punishment, they took into consideration the myriad of circumstances and that's why the range is so broad. Do you understand what I'm saying?

A Just to get this clear, it's a minimum of five years for, like he was speaking earlier, murder, just straight out murder?

Q Straight out murder, yeah, and a maximum of life, ninety-nine years or life and an optional fine of $10,000.00.

No one says that you have to give the maximum and no one says that you have to give the minimum. The law requires that you be able to consider and, under the appropriate facts and circumstances, be able to assess the minimum or the maximum or anything within that range if you think that is the proper thing to do. You make the determination as to whether or not you think [2212] it's proper based on the evidence that you hear.

A The evidence is the main thing.

Q Can you do that, sir?

A Well—

Q Keep an open mind, that's all we're asking you to do.

REPORTER: What was your answer?

MR. KENNEDY: I didn't. I just said well.

A Like I say, it would take probably a lot of thinking on my part because for—to me, that's a broad range, five years to ninety nine-years. It seems like to me five years is a small amount to put on a person's life. It seems like the value of a human life is more than that. To say that I might take a person's life and I might only go to jail for five years and a $10,000.00 fine. That would be the minimum that you would be looking at.

MR. NELSON: Excuse me, Judge, and excuse me, Mr. Kennedy. You made a comment that the minimum was five years and a [2213] $10,000.00 fine. I think it needs to be clear that the fine does not have to be assessed. The minimum is five years with no fine whatsoever.

Q But also, the fine can be assessed, too, though. You don't have to, but you can.

MR. NELSON: But that wouldn't be the minimum. If a fine was assessed, it would no longer be the minimum.

THE COURT: You understand that, don't you, Mr. Kennedy?

MR. KENNEDY: Yes.

THE COURT: That fine is at the discretion of the jury, but is part of the potential punishment.

Q Okay. Now, are you trying to-think up some. facts that would warrant a five year sentence at this time?

A Normally in your mind you would think about it because when you say that the minimum is five years, you would try to think [2214] of what situation would come up where a person would only get five years.

Q Now, realize, Mr. Kennedy, that this is your first time down here. Now, you probably have fifty years of trial lawyer experience sitting before you and that's not even including the Judge's experience. The legislature set that range of punishment, from five to life. You don't have to sit there and think of a situation. The only thing that we're asking you to do is to have an open mind to the evidence in the case, just have an open mind to the evidence, and if the evidence establishes in your mind that the proper facts and circumstances have, in fact, been presented and you feel in your heart that the case should be a five year-case, that the sentence should be five years, then be able to assess that, consider it and be able to assess it based on the evidence.

MR. MACALUSO: Excuse me, Your Honor. I'm going to have to interrupt, Mr. Kennedy, and I apologize for that, but I have to object that we're kind of getting [2215] a little bit far afield. The prospective juror should be reminded that we're still talking about a murder case. We haven't heard the word murder in quite a while. It's a murder case where one person knowingly or intentionally—

MR. WEST: Your Honor, I would ask that counsel make a legal objection.

MR. MACALUSO: He can't answer the question—

THE COURT: Ask your question again, Mr. West.

Q Mr. Kennedy, do you understand that we're talking about murder?

A Yes.

Q Okay. That's what we've been talking about for the last five minutes, right?

A The last hour, in fact.

Q If for some reason I go to another subject, I will make sure that you know we're going to another subject, otherwise we're talking about murder, okay?

[2216] MR. MACALUSO: I wasn't suggesting that you went to another subject, Mr. West.

Q Mr. Kennedy, again, the only thing we're asking you to do is to keep an open mind and if you feel as though the f acts warrant a sentence of five years, you be able to assess it. If you feel as though it warrants life, you be able to assess it. Just keep an open mind, that's all we're-asking you to do.

A I feel that I'm pretty much an open-minded person, but it would depend on the facts.

Q That's what I'm saying. It depends upon the facts. That's the whole point. It depends upon the facts that are presented to you. If you feel as though it a calls for five years, whether you can think of a situation right now or not.

A You know, as I have spoken earlier, even if I said that it would come up on a minimum of twenty, which eleven other .people on a jury—and you know, any one—like I said, you-all being out there, you-all know this, even if one person did decide, one [2217] person is not going to be the one to decide the whole verdict. It's got to be a consensus of twelve people.

Q But those twelve people all must be able, in order to be qualified to serve on a jury, to consider the full range of punishment and that's what I'm asking you, to be able to consider and, under the proper facts and circumstances, be able to assess five years and all the way up to life. Like you said, it depends upon the facts.

A Yes, it does.

Q Would you be able to consider the full range of punishment and be able to assess it depending upon the facts that you hear?

A I would say I don't know because it would have to depend on the facts.

Q That's what I'm saying, it depends upon the facts. I'm not saying—again, I'm not trying to commit you to—

A As I said earlier, my personal opinion would be I would say a minimum of twenty. If I was going to be one of the lawmakers or something, I would say a minimum of twenty.

[2218] Q I understand that and you have a right to feel that way, but what I'm saying is, the full range of punishment—in order to be qualified to sit on the jury, you must be able to follow the law and the law is saying that the full range of punishment for murder is from five years to life. I'm not asking you to commit to five years. I'm asking you to have an open mind to five years to life. If you hear facts that warrant the minimum of five years, would you be able to assess it under the facts and circumstances as you view them?

A Yes, I believe I could.

Q Okay. Now, you're saying that you believe that you could. Because of the nature of this particular case—and the law requires me to make sure that you understand—we can't have believes. We have to have a position on it, yes or no. Yes, I will be able, to consider the full range of punishment instead of I believe I could. Again, you haven't heard the facts. You need to have an open mind to the facts. That's all we're saying.

A That's what I'm saying will determine the whole case, the facts.

[2219] Q Exactly.

A Because like I say, you aren't guilty until proven guilty.

Q You may never hear a five year case sitting on this jury or any jury, but the law just requires that, if you did hear a case where you believed five years was the appropriate punishment, you would be able to assess that five years. Can you do that? You said I believe I could.

A Here again, I say it would be—I would have to hear the circumstances. It's hard to say whether I could be open-minded or not. It would just have to depend upon the circumstances. I think I'm a reasonable person, you know. Anybody that is a reasonable person, like dealing with your own kids and stuff, you know you would have to be able see the facts and then you would deal with the situation. I've been a school teacher, so I know with kids, when you're dishing out punishment, you have to deal with the facts. Now, what your beliefs are up front and once you deal with the facts, then you might make a different decision because all cases are not [2220] the same and that's why you've got this broad range. It also depends on the circumstances and that's why I keep going back to that because it's hard to say that you would do a certain thing in any given situation because most people are going to do things differently.

Q See, again, I don't know whether you're misreading me or not, but I'm not trying to get you to commit to anybody's ideas.

A I know what you're saying. You're saying being open-minded to it. I don't know what circumstances. I'm not that familiar with the law as to what circumstances would warrant five years and which would warrant life.

Q And nobody is trying to get you to say what circumstances. There is no way in the world that you-could imagine all the circumstances sitting up there on the witness stand and the law won't let you. The only thing that the law is asking you to do is to -you may not ever hear a case where you would give the minimum of five years. The law only requires that if you do hear that case, if you do, within the next ninety-nine years, a hundred years or so, if you heard

that [2221] particular case, would you be able to assess the minimum of five years, if you heard it and believed that it was the thing to do? You see, don't try to think of circumstances. I'm saying if you heard a case where you believed that it was the thing to do, would you be able to do it? It would have to be based on the evidence.

A Yeah, I believe I could be openminded.

Q Again, you're saying I believe. Are you saying that you could be open-minded and that you would be open-minded?

A Yes.

Q So your answer to the question is that you would be open-minded to the full range of punishment?

A Yes.

Q Now, obviously there's a conflict concerning you being able to—your response to Mr. Nelson's question and the response to my question. You -told him at one point that there was no way in the world that you could consider anything less than twenty years?

A Right.

[2222] Q Now, by me having explained to you, do you understand what the law requires of you?

A Uh-huh.

Q You've got to—

A Yes.

Q Now, what do you understand your role to be as a juror when attempting to make a determination as to what the appropriate punishment is going to be?

A The way I interpret it at this point—well, probably at any point—would be like the evidence and the way that I feel is also going to be in with eleven other people and the way they feel.

Q What is your understanding about the minimum punishment now?

A I understand that the minimum is five years for murder and the maximum is the death sentence.

Q No. It's life.

A But we're speaking of capital murder, right?

Q We're talking about murder. We're still talking about a murder. Now, you're [2223] telling the Court and you're telling the defense and the State that you will keep an open mind as to the full range of punishment and if you hear facts and circumstances that you believe in your heart warrants a five year sentence and if you hear evidence from that witness stand that you believe would warrant a five year sentence, you could consider and also assess it; is that right?

A Yes—well, based on my opinions, it would have to be some strong evidence.

Q I don't have any problem with that. I'm just saying have an open mind to it. If it has to be strong evidence, then fine. That's up to you. The law requires that you be able to consider and, under the appropriate facts and circumstances, be able to assess it. If you're saying there has to be strong evidence, then fine, it has to be strong evidence. You're saying that you can consider and assess it if you felt as though five years was the proper punishment?

A I would say if I felt that way.

Q Again, if you felt that way.

A If I felt that way.

[2224] Q What does that mean?

A That means the evidence would have to be strong enough to make me feel that way.

Q. All right.

A It would have to be very strong because, as I said earlier, I have feelings in one direction. The evidence would have to be very strong. Very, very strong in order to make me change that feeling.

Q Right. That's-all we're asking. So you're saying that you will have an open mind and if you believed that the evidence warranted it, a sentence of five years and you believe—

A You will have to really prove it.

Q Any defense attorney would have to convince you that five years was the appropriate thing to do, right?

A Uh-huh.

Q And you believed that evidence, then you would be able to give five years, right, but you would have to believe it?

A I would definitely have to believe it.

[2225] MR. NELSON: Excuse me, Mr. West and Mr. Kennedy. I'm sorry to interrupt again, but, Judge, Mr. West made a comment that the defense had to prove it, but the defense has absolutely no burden to bring any evidence whatsoever of any type at any time.

MR. WEST: I'll withdraw that, Your Honor.

MR. NELSON: Mr. Kennedy could be called upon to make that decision without the defense—

MR. WEST: I'm withdrawing the question.

Q Mr. Kennedy, if you believed—again, in order to be able to assess the minimum, you would have to believe that the evidence really called for it, right?

A Yes.

Q Okay. In order to assess the maximum, you would have to really believe that the evidence called for it; is that correct?

A Yes.

Q All right. Now, I see that you are a deacon at your church?

[2226] A Yes.

Q Who is your pastor there?

A Reverend C. H. Dorsey, Clarence Dorsey.

Q You work with the finance committee?

A Yes.

Q What position do you hold on the finance committee?

A Finance secretary.

Q How long have you been the finance secretary?

A About six years.

Q Are you a member of Prince Hall?

A I was a member of the Blue Lodge. Since I've been in Dallas, I have not been.

Q Is it a Prince Hall affiliation?

A Well, depending on the degree. I would have to check into it to see what degree it is.

Q What degree are you?

A Third degree.

Q You are a Master Mason, right?

A Yes.

Q I see you're a member of Phi Beta [2227] sigma?

A Right.

Q That's a fraternity?

A Yes.

Q Now, have you ever heard of Omega Si Phi fraternity?

A Oh, yes.

Q If I was an Omega, that wouldn't make you bias or prejudice for or against me in any way, would it?

A No.

Q What do you like about the Cosby Show?

A It's putting a black family in what I would say is a good role on TV, just a standard role, you might say.

Q What type roles are blacks normally cast in in your --

A Well, they have been cast as the ones with a lot of -- well, not portraying a true black family. I know Cosby might be, say, the upper end of one as two doctors in one house, but I like the show.

Q Do you listen to Tom Jones?

A Yes.

[2228] Q Do you ever listen to Willis Johnson?

A Sometimes.

Q Have you understood everything I've said so far?

A Yes.

Q Do you have any questions about what is going on?

A I think I understand what is going on.

Q What about that speeding ticket in that small town-, did you understand what was going on?

A Oh, yeah.

MR. WEST: I'll pass him, Judge.

THE COURT: Mr. Kennedy, believe it or not, I'm going to be the last person that you talk to I want to make sure that I've .understood your answers to Mr. West's questions and Mr. Nelson's questions. The reason I'm doing what I'm doing is, Mr. Nelson talked to you about thirty minutes [2229] ago and some of the things you told him—and then Mr. West asked you in the same area. There's been some time gap between them and, while I took careful notes, I want to make sure that you, Mr. Kennedy, and I are on the same wave length. What I'm going to talk about is this question about your feelings about being able, in a proper case, to assess a five year sentence.

As I recall, as Mr. Nelson summed up, you were asked to consider a situation where you as one of the jurors had found a defendant guilty of the offense of murder. No capital murder. Forget about that, just a murder case such as Mr. Nelson explained. .The jury has found beyond a reasonable doubt that a defendant had knowingly or intentionally caused the death of another individual without any legal [2230] justification or excuse. Mr. Nelson-explained that that might be self-defense or it could be what we call voluntary manslaughter, that situation about involving your child in the sex abuse situation, or insanity. Those are defenses. If you, as one of the jurors, found that one of those things existed, you wouldn't find the Defendant guilty in the first place of murder. Do you understand? That's all out of the picture. You don't have that kind of situation.

You have the knowingly or intentionally causing the death of another individual by some manner or means, shooting, stabbing, choking. So you found the Defendant guilty of that.

Now, at this point in time, here's what the lawyers have been saying to you—and I think they were quite accurate in the way [2231] that they did it. They didn't mislead you or try to. The only reason I'm coming back at you is, there was gap of time. What both of them were saying is this: Both sides in this case, both the State and the Defendant, are entitled to twelve jurors over there in the jury box, if they have found a defendant guilty of the offense of murder, to have twelve people in the punishment phase of the case who can be of a frame of mind that, if they heard facts and circumstances in that case or whatever they might hear at the punishment phase, if anything, would in a proper case—that individual juror working together, as you said, with the eleven other .jurors, would in a proper case be able to assess a punishment anywhere within the range of punishment that the law allows for a murder case which is five years [2232] in the penitentiary up to a ninety-nine year sentence or a life sentence and in addition to that, as Mr. Nelson pointed out, a fine of up to $10,000.00, if you wanted to. The question then comes down to, if you were a juror in a murder case and in a proper case, if the facts and circumstances warranted it in your mind and you thought it was proper, could you assess a five year sentence for the offense of murder, that is the knowing or intentional causing death of another individual?

MR. KENNEDY: There again, listening to what they have said and also making me think that you would also have to go along with .the concept of the law.

THE COURT: What the law provides for, as Mr. West pointed out properly and I think Mr. Nelson did, too—the law doesn't [2233] require you to imagine the facts it would take you to give a five year sentence, but what the law is saying—and I'm not going to say it quite as delicately as they did—if you are a juror who says I don't care what the facts and circumstances I ever heard in a murder case are, I could not assess a five year sentence, that's one thing. If you're a juror

who says I can't imagine facts and circumstances, but if I heard them, I could assess a five year sentence, that's still another thing. Where do you fit yourself in that picture?

Are you of the frame of mind that you could never hear a case where a five year sentence would be appropriate in your mind for murder?

MR. KENNEDY: In those circumstances, I would have to put myself—as I've told them, I [2234] would put twenty years on someone's life. It seems like it would be valued at more than five, but if you have to weigh the circumstances and you look at it and you've got twelve people over there judging, your decision—you should be open-minded about it. You should be able to, with those twelve people, come to some sort of conclusion.

Now, mine may be twenty years, but I would like to judge it on the fact.

THE COURT: Well, if those facts—could there be a set of facts in your mind that would permit you to participate in a sentence of five years with your other fellow jurors?

MR. KENNEDY: I would put it this way. Are you just asking me if I could be open-minded or not because I wouldn't know how—what facts it would take to say [2235] this one is five years. When I think of something, I think of a murder, then I think of it as taking a person's life. I would say here is my value that I would put on a person's life. This is the way that I look at it. Now, you can present facts and I know, being on a Jury, you would have to sit there and be open-minded because you can't go in and say, okay, this person killed so hang him because you don't know all the circumstances and facts. That's what you're asking me to do, listen to the facts. They asked me opinion and I gave my opinion. If I can be open-minded—I think I can be open-minded enough, yes. My main thing is, you've got to listen to the facts.

THE COURT: If you heard a set of facts that told you five years was the proper punishment in a murder case, could you vote for [2236] it, a five year sentence if you heard that set of facts? Can you give me a yes or not to that? I hate to do like the lawyers did, but I've got to have a yes, I could or no, I couldn't.

MR. KENNEDY: Like I told him, there would have to be strong facts. Facts could change a person's opinion. I'm not saying a person's opinion could-not be changed, but I'm a pretty strong opinionated person. The facts would have to be—well, I know they would.

THE COURT: Did you day yes?

MR. KENNEDY: No. I haven't answered you yet. I was thinking about it.

THE COURT: Take your time. .This is obviously an important question because we've spent a lot of time on it. I'm sorry that I have to bring you to the point of saying yes, you could or no, you [2237] couldn't, but I do need to do that to determine your qualifications in this case.

MR. KENNEDY: I would say yes.

THE COURT: I hold that he is qualified, Mr. Nelson.

MR. WEST: Your Honor, I have a few more—

THE COURT: I'm sorry.

Q For record purposes, and I'm not asking you this to be funny or anything like that sir, okay?

A Okay.

Q You may say it's apparent in the courtroom as to what your race is, but it's not apparent on the record. This stenographer here is taking the record. Could you tell me what your race is, sir?

A Black.

MR. WEST: Nothing further.

THE COURT: What says the State, Mr. Nelson?

MR. NELSON: Your Honor, at this time the State will exercise [2238] a preemptory challenge.

THE COURT: Mr. Kennedy, you'll be excused from any service in this case and I want to thank you on behalf of the lawyers for your patience with us and your candid answers this afternoon. I believe you've told us exactly how you feel. You were asked some hard questions and gave some hard answers. Thank you, sir.

MR. WEST: Your Honor, before he gets off the stand, I want the record to reflect the nine strikes that the State has used, they've used six on blacks.

MR. MACALUSO: Thank you very much, Mr. West.

THE COURT: I won't comment on those number because I don't .know. Let's take a very short break.

MR. NELSON: Your Honor, I want to put one other thing on the record before or after we take our [2239] break.

THE COURT: Do you want to do it after our break, Mr. Nelson? We'll do it when we come back.

(Whereupon, Mr. Kennedy left the courtroom, after which the following proceedings were held.)

THE COURT: Go ahead and do it now.

MR. NELSON: Your Honor, the State would like the record to reflect the following reasons for our exercising a preemptory challenge on Mr. Kennedy: He was hesitant about assessing the death penalty in this type of case, that being a murder during the course of a robbery. As matter of fact, his comment was that he felt the ,death penalty was probably only appropriate for a mass murder situation. He further was hesitant in answering the questions yes in spite of his [2240] personal feelings which would be opposite. For example, if he thought the Defendant should receive a life sentence, he

hesitated for a great deal of time in saying whether or not he could still answer the questions yes knowing it would result in the death sentence. Because of that, the State exercised a preemptory challenge on this potential juror.

(Whereupon, a short break was taken, after which the following proceedings were held.)

THE COURT: Mr. Salsini, I don't believe you raised your hand yesterday in reference to the question about having any conflict, did you?

MR. SALSINI: No.

THE COURT: The only thing I want to say to you before I turn you over to the lawyers is, to do what you're doing now which [2241] appears to be just leaning back and relaxing and answer these questions like you feel and don't worry about telling the lawyers something you think they want to hear. Just tell them how you feel about things.

* * * *

[3837] TROY L. WOODS,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, whole truth and nothing but the truth, examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Good afternoon, Mr. Woods. Let me begin by reintroducing everybody here. I'm Paul Macaluso. This is Jim Nelson and we're the lawyers for the State. We work for the district attorney's office and we're representing the State of Texas and Dallas County in this case.

Next to Mr. Nelson is Mr. Brice Cunningham.

MR. CUNNINGHAM: How are you, Mr. Woods?

MR. WOODS: Fine. How are you?

Q And next to Mr. Cunningham is Mr. Royce West.

MR. WEST: Mr. Woods, good afternoon.

Q They're the defense attorneys. [3838] They're defending the man who is charged with capital murder. He is the Defendant and his name is Thomas Joe Miller-E1. He is at your very far right, Mr. Woods. You're tall enough. I think you may be able to see him from where you are. Do you see him down there? That's the Defendant and he is charged with capital murder which, as you know, is the most serious offense under the laws of this state. It's serious because of the type of offense it involves, capital murder, and it's also serious because it carries the two most serious types of penalties under the laws of this state. One is a sentence of death and the other is a possible sentence of life. These are things that the judge discussed with you the other day.

I'm trying to remember if you have been down here on jury here on jury duty before.

A No.

Q You have not served on a jury before?

A No, sir.

Q Ordinarily, Mr. Woods, if you came down here for any other type of case, you would [3839] be interviewed by the lawyers. The lawyers would talk to you, but we would ask you questions as you sat out there like you did on Monday with all the other people. We would ask you four or five or six questions and so forth and so on. The law allows us in this type of a case only to talk to you individually as we're doing now. It's kind of private here now, isn't it?

A Yes, it is.

Q It's a lot more private than it was yesterday. I think the idea behind that is, because the death penalty is involved in this case, so you can be as relaxed as you can possibly be

without having a bunch of strangers around here to hear what you have to say. Do you see what I'm getting at?

A Sure.

Q Relax as much as you can, Mr. Woods, and I want you to bear in mind that nothing you tell us would be wrong or right. All we want to do is know how you feel. You don't have to say anything to please any one of us. That's not your responsibility. Your only responsibility is to tell us how Mr. Woods [3840] honestly feels about anything. If you do that, you will be doing your job. I want you to know that no one is going to argue with you or quarrel with you or try and talk you into something or sell you a bill of goods. If you have a question about anything, you ask it. If there is something that you need to tell us, you just tell us what it is. Like I said, we're trying to find twelve people to act as jurors. We only have seven. We have either talked to or considered ninety-eight people and we only have, out of those ninety-eight, seven that are qualified to serve on this type of a case. Do you see what I'm getting at?

A Yes.

Q Because it's a very special type of a case when it involves the taking of another human life. Now, let me tell you what our position is, Mr. Woods, that is what the State of Texas, that is Mr. Nelson, myself and Norman Kinne, who was not introduced to you yesterday, but he's actually the lawyer who will be leading on this case once it begins. We are actively seeking the death penalty in this case for Thomas Joe Miller-El. What I [3841] mean by that is, we intend to offer evidence before this jury once the trial begins to prove that Thomas Joe Miller-El is guilty of capital murder just as he is charged in this indictment. In other words, he did the capital murder. In the second phase of the trial, we intend to offer evidence to convince a jury beyond a reasonable doubt that the questions that determine life or death should be answered yes which will automatically result in the Defendant being sentenced to be executed down at Huntsville,

Texas. That's our desire based on the evidence. I make no bones about it, Mr. Woods. We know that the law allows for the death penalty in this type of a case depending upon the evidence and we're going to do our dead-level best to provide this jury as the law requires with the type of evidence that will result in this jury making a decision that would result in this man being taken down—well. first of all sentenced to death and then at some later date being taken down to Huntsville, Texas where the penitentiary is, placed on death row and then at a time designated by law, taken over to the death [3842] house where he will be put on—do you know what a gurney bed is or what a gurney is?

A Sure.

Q Put on a gurney, taken to the death house where he's strapped down. They put a needle in his arm and inject him with enough of a drug, a lethal substance, to put him to death and eventually in a grave somewhere, someplace. Now, I don't mean to be gory about it, but this is not something—this is something we've told all the jurors just to be fair with them, Mr. Woods.

MR. WEST: Your Honor, that is a misstatement. All the jurors have not been told that.

THE COURT: I'll sustain that. Let me say, Mr. Woods, that we talked to some—I believe you're juror number ninety-eight and obviously every juror hasn't been told the same thing for one reason or another.

MR. WEST: Your Honor, could the juror be excused for one second for purposes of the record?

[3843] THE COURT: Sure. Mr. Woods, let me ask you to go out in the hall.

(Whereupon, Mr. Woods, left the courtroom, after which the following proceedings were held.)

THE COURT: Go ahead.

MR. WEST: For purposes of the record, I think the record should reflect that it is my recollection that not all of the jurors have been told that, but all of the black jurors have, in fact, been told that either by Mr. Nelson or Mr. Macaluso.

THE COURT: I won't comment on that because I haven't kept track of it.

MR. MACALUSO: Judge, I would renew the objection made that, if either side had a legal objection to make, to make a legal objection. I don't see that there is any legal objection.

[3844] THE COURT: I don't think it is, either.

MR. WEST: I just wanted the record to reflect that.

THE COURT: I'll sustain the objection. Let's go ahead. regards to that, I know some jurors, the record will reflect, have been told that. Who they were or what their situation was, I don't know.

MR. NELSON: All the jurors have been told that we're actively seeking the death penalty, Judge. It's been put different ways, but they've all been told that, that we're seeking the death penalty.

MR. WEST: Judge, the only thing that I'm saying is, as far as the description of the taking .him down to Huntsville from death row to the death house and being tied down to a gurney and then a needle put in their arm and then injected with a lethal substance [3845] until they are dead and he added put him in a grave this time.

MR. CUNNINGHAM: The statement was made that we have told every juror that and that's not true. Mr. Nelson didn't tell the last one and Mr. Macaluso didn't tell the one before.

THE COURT: Let's move on. We could argue about this for an hour. I don't think it makes any difference. I mean, it does, but what a juror understands is one thing. Go ahead.

(Whereupon, Mr. Woods returned to the courtroom and the following proceedings were held.)

Q Mr. Woods, the reason I tell you that is to put you on notice. We have put all the jurors on notice what our position is with regards to this case, all the jurors that we've talked to. It is only out of fairness to you and the other jurors that you know exactly what the stakes are in a case of this type. I'm [3846] sure when you came down here or I'm reasonably sure that when you came down here, you thought like most people did, you would end up on a burglary case or a theft case maybe, a DWI, or something like that. I don't imagine many people came down to the courthouse on Monday, who are on this panel here, thinking that they would be involved in a capital murder case where they might be called upon to make a decision that would result in them actually—you know, one of the people out there on that jury panel making a decision that would result in another person, Thomas Joe Miller-El, being put to death, being executed.

You know that they're executing people in Texas these days. It's not a situation where you're just reading about it, as you read about that from time to time or you hear about it on the radio or on TV. But if you were actually on a jury of this type, you could be called upon to make decisions that would result in you actually participating in that decision. Like I say, it's not something where you just kind of talk about it with friends or your family. It's not a situation [3847] where you read about it or hear about it. I guess what it boils down to is, you at this particular point are right in the middle of it. Do, you see what I'm getting at?

A Sure.

Q The reason why we tell you this is to make sure that it's clear as we can just what would be involved in this type of a case if you're selected as a juror. As I said earlier, you know as well as I do that this is the type of case, when you talk about the death penalty and you talk about capital punishment, you talk about executing somebody, people have strong feelings one way or the other. Do you see what I'm getting at?

A Yes.

Q Now, what we want to know and what is most important in the final analysis, Mr. Woods, is how you feel about it?

A About capital punishment?

Q Right..

A About capital punishment, I think that punishment is too easy. I think that's a quick relief. I mean, you know, to give a person quick relief—what I call capital [3848] punishment is you give somebody hard labor for the rest of their life. I feel like that's more of a punishment than putting theca to sleep.

Q Well, you just think that's too easy?

A Yeah.

Q In other words, you feel, when someone is executed, it's over.

A It's too quick. They don't feel the pain. That's the way I feel about it.

Q What do you think a person ought to receive for committing the worse types of crimes? What sort of punishment do you think they ought to receive?

A Well, what I call punishment is back to the old Indian days. Pour some honey on them and stake them out over an ant bed. That's the way I feel about it. That's what I call punishment.

Q Do you have anything against the death penalty itself?

A No. I don't have anything against the death penalty.

Q Do you know of any reason, Mr. [3849] Woods, why you couldn't serve on this jury and answer questions and follow the law if it meant you making a decision that would mean this man ultimately down here would die? Could you make that decision?

A Sure, I could make the decision.

Q Do you think you could do it?

A Sure.

Q Even if it meant, as a result of your decision, that man—can you see him where he is?

A Sure.

Q Breathing the same air we're breathing here in the courtroom, he would be taken down to Huntsville and put to death?

A Sure, I could make that decision.

Q Do you know of any reason whatsoever why you couldn't do that?

A No, I don't know no reason at all.

Q Why do you think people ought to be executed in the first place?

A I think if people go out and take people's lives for no reason at all, I think everybody should be punished.

Q If I told you I was against the [3850] death penalty or against real serious punishment and you were for it, and obviously you are, isn't that right, what would you say to me to try and convince me that I should give the death penalty to somebody and why it is proper?

A Because we don't need people like that on the streets.

Q Have you ever felt differently about that?

A No. I've felt that way all my life.

Q All right. Let me ask you this: You said that you felt they should be staked out over an ant hill—

A That's not what I call being funny, but—

Q I agree with you. That would be some kind of punishment. That's not the law you understand?

A Yes, I know.

Q Let's just say it was the law. Do you think you could actually sentence someone to be staked out over an ant bed?

A Sure. I feel like if they survive

* * * *

[3852] Q How about your folks, are they alive, Mr. Woods?

A Sure.

Q Do you know how they feel about the death penalty?

A No. I never discussed it with them.

Q You're a married man. How about Mrs. Woods, do you know how she feels about it?

A She's been on jury duty before, but I have never discussed that with her before.

Q If you had to hazard a guess, what would you say?

A I feel like she would go for it.

Q All right. Let's talk a little bit about the law in this type of a case and a trial of a criminal case generally. A person can only receive the death penalty, Mr. Woods, in Texas for the offense of capital murder. It doesn't matter whether he rapes somebody. It doesn't matter whether you rob somebody, commit theft, or anything. You have to commit a murder first and it must be a very special type of murder. The death penalty is only available [3853] as a punishment under very rigid circumstances for capital murder only. Am I making myself clear?

A Sure.

Q Capital murder involves a murder and murder is a situation where one person knowingly or intentionally causes the death of another without any legal excuse or legal justification. Am I making myself clear?

A Sure.

Q Okay. By that I mean, when you think about murder, you don't think about self-defense. If I kill Mr. Nelson and you believe I did it in self-defense, that's not murder. That's a

homicide, but it's not murder. You would have to find me not guilty.

A I understand.

Q Just like I would find you not guilty. The same thing if you kill accidentally. It's not murder. It's not guilty. Let's say you believe I was insane. When I killed Mr. Nelson, you believe I was insane. Not guilty. That's not murder. The same thing would be true if I came home and found out that someone that I love, like one of [3854] my children, had been sexually molested by my neighbor and he's up the street laughing about it, do you see, and I go into a rage and pick up a gun and run up the street and I kill him. Now, that's a homicide. It's bad, but it's not murder. That's a crime of passion and the law says that's voluntary manslaughter. It's not murder.

You must first commit murder. Even that type of murder, just regular murder, call it, you can't receive the death penalty for that. If you commit murder and you murder a police officer or a fireman, a jail guard or you commit murder for money or you commit murder where you kill a bunch of people, then that becomes capital murder it becomes more serious, .you see, that type of murder. if you commit murder while you're committing a robbery, if you rob somebody and kill them, or raping them and you kill them, you commit burglary and-kill somebody, arson or kidnapping, then murder under those circumstances becomes capital murder and you can receive the death penalty. Am I making myself clear?

[3855] A Sure.

Q How do you feel about that?

A I feel like calling a person insane, we're letting too many people get away with it, talking about insane. I feel like we ought to be able to given this to capital murder.

Q We'll talk about that in just a little bit. Let's forget about insanity for a little bit, all right?

A Okay.

Q How do those particular types of capital murder square with your way of thinking of what a person ought to receive—

A Fine.

Q Do you think a person ought to receive the death penalty for killing a police officer?

A Sure.

Q Do you think a person ought to receive the death penalty if he's robbing somebody, goes into somebody's business, for example, pulls out a gun and robs and kills them?

A Yes, even more so.

[3856] Q What would you give them for doing that? If you had your way about it, what would you do to somebody who went into a place of business, robbed somebody, and then executed them?

A I feel like they should get capital murder.

Q Would you have any problem returning the death penalty in a case like that?

A No.

Q You understand, before you could even consider the death penalty under the law, it would have to be for a type of capital murder?

A Yes.

Murder during a robbery—we've alleged in this case for Thomas Joe Miller-E1, that man right down there, that he killed a man by the name of Douglas Walker while he, Thomas Miller-E1, was robbing Douglas Walker. So we have the murder. We've accused him of murdering Douglas Walker while he was robbing Douglas Walker. I believe you said, if we proved that to you beyond a reasonable doubt, [3857] would you find him guilty?

A Sure.

Q If we don't prove it to you, you find him not guilty?

A Sure.

Q If we prove to you, in the second part of the trial—and you understand that the second part of the trial is where the issue of life or death is determined?

A Right.

Q You understand, in the first part is where you decide whether we've proved someone is guilty or not guilty?

A Yes.

Q You can do that? If we prove him guilty, you can find him guilty and, if we don't, you will find him not guilty?

A Right.

Q Now, in the second part of the trial, you're called upon to answer these questions. Did you get a chance to read those yesterday?

A I read these two here. I didn't see that.

Q It used to be under the old law [3858] just like in the movies. After a jury heard all the evidence in a murder case or a capital murder case, the jurors actually went back in the jury room and decided whether a person should receive the death penalty or a life sentence. If they all agreed he should get death, that's what the judge gave him. If all the jurors agreed he should get life, he got life. Do you think you could do that if you were called upon to do that?

A Sure.

Q Well, the law changed—that's kind of a trick question. The law changed about ten or twelve years ago and you don't do that directly. Instead, you answer questions. You don't decide whether somebody should live or die. You don't make that decision at all. You're not even asked to make that decision. All you do is, after you've heard all of the evidence, you decide whether or not we proved to you that these questions should be answered yes. If we do, you should answer them all yes. The effect or the result is, three yes answers is a sentence of death automatically. You don't have to write in death. You just answer [3859] the questions yes and the Judge sentences the Defendant to be executed. Do you see what I'm getting at?

A Yes.

Q On the other hand, if you answer one or more of the questions no, do you know what happens then? The judge automatically assesses a sentence of life for the Defendant. Do you see?

A Yes.

Q You don't decide life or death directly. You answer the questions and then the determination is made on the basis of the answers. Do you see what I'm getting at?

A Yes.

Q Could you do that?

A Sure.

Q Do you know of any reason why you couldn't do that?

A No.

Q You looked at the first two. The third question there—let's take them out of is if order. The third question, all that does ask you whether or not this was a provoked killing or was it an unprovoked killing. If [3860] you decide it was an unprovoked killing, you answer the question yes. Yes, it this was an unprovoked killing. Do you see what I'm getting at?

A Sure.

Q If on the other hand you decide there was some provocation that the victim did something to provoke the defendant into killing him, then you decide whether the defendant acted reasonably or unreasonably. Do you see how you could answer that question yes or no?

A Yes.

Q Okay. Now, let's turn to question number one. Does that cause you any problems at all?

A No.

Q Does that seem like a reasonable question to decide whether or not the defendant acted deliberately and with the reasonable expectation that someone was going to die, either the deceased or somebody else?

A That's a good question.

Q Do you see how you could answer that question yes or no?

A Yes.

[3861] Q Any problem with that?

A No problem.

Q Number two asks you, is there a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society. What do you think you're being asked there?

A I think they want to know, if he got out again, would he act again.

Q All right. If he got out again, would he do it again?

A Yes.

Q All right. The key word may be that word probability. What do you think that word means? What do you think they're driving at with that question?

A Probably that he would do it again.

Q Would he probably do something like that again. You notice, Mr. Woods, that it didn't say would he probably do another capital murder or would he do another murder.

A A criminal act.

Q Of violence?

A Right.

[3862] Q What sorts of things come to your mind when you think of a criminal act of violence?

A Anything that you could do to harm somebody or kill someone or something like that.

Q Taking a baseball bat to Mr. Nelson, for example, and beating him up would be a criminal act of violence?

A Right.

Q Another murder, robbery, rape?

A Right.

Q What do you think would be valuable to you, what would aid you in answering that question yes? What would you want to know about someone before you would

say, yeah, he would probably commit some criminal act of violence?

A It would depend on what we was talking about it, what I feel like that he might do and whatever kind of trouble that he was in, what we was trying him for.

Q What he did this time?

A Right.

Q Maybe what he did before, if he [3863] had done something before?

A That's what I would base that question on.

Q If you learned what role he had in the crime itself for which he's on trial, in other words you learn about if he was involved in the planning, did he plan it or did someone else plan it; during the offense, did he participate directly, was he calling the shots or was he standing by; did he have to kill this individual or did he not have to kill him. Do you see what I'm getting at?

A Right. That's the way I would answer that question.

Q Then after the crime, how did he react afterwards; was he sorry or was he just kind of blase about it? Do you see how you could learn enough about an individual to say, yeah, this is the guy that probably will do something like this again?

A Right.

Q In which case you answer the question yes?

A That's if we've already answered the question yes, he was involved and we're [3864] really wanting to know if he would do all these criminal acts again because ninety-nine out of one, there's one that did at least two or three acts that way. They're going to constantly do it again.

Q You understand that these three questions are what separates life and death?

A Right.

Q If you answer one of the questions no, he gets a life sentence. If you answer all three of the questions yes, he gets a death sentence. I don't mean to keep harping on this, but do you know of any reason why, if you were on this jury and the

proof convinced you that those questions should be answered yes, knowing that it's going to result in this roan over here being executed, do you know of any reason whatsoever why you wouldn't answer those questions yes?

A No, I don't know no reason at all.

Q Now, let's shift gears here for just a second. We've talked about life or death because that's the penalty for capital murder. A lesser offense of capital murder would be murder. Let's imagine just for a [3865] moment, as an example, that you're on a jury and let's say we charge the man—not this man, but some imaginary man—with capital murder. Let's say he committed murder during a rape. That's capital murder. We have to prove the murder and the rape. Got it?

A Right.

Q Let's say we prove the murder, but we don't prove the rape. You couldn't convict that person of capital murder under those circumstances because we didn't prove both of them, did we?

A No.

Q What did we prove?

A You proved murder.

Q If that were to happen, you would find him not guilty of capital murder and you would find him guilty of murder which is what we proved. Under a situation like that, Mr. Woods, the range of penalty is altogether different. It is no longer life or death. You just forget about that for the moment. The range of penalty for murder is from five years to ninety-nine years or life. Can you see how broad that is?

[3866] A Yes.

Q The law allows you, if you sit on a murder jury, to find someone guilty of murder an-d consider the full range of penalty. Do you think you could do that?

A Yes.

Q I know you feel strongly about murder, don't you?

A Sure. I always feel that way. Anybody that go out and take somebody's life, I always feel that way.

Q By the same token, would you agree with me that there are all different types of murders and murderers and victims?

A Sure.

Q You know as well as I do, if we sat here for ten hours or ten days or ten minutes, we could think of a thousand or a. million different situations where one person could end up killing another. Do you agree with that?

A Yes.

Q The law expects you, to be a qualified juror, to just say you will keep an open mind. Do you have an open mind?

[3867] A Sure.

Q Even though you consider all murders serious, you will agree with me, won't you, that some are more serious than others?

A Right.

Q Some killers deserve more time than others?

A Right. I agree.

Q Some may deserve less than others, right?

A Right.

Q All the law expects of you is to keep an open mind and wait until you've heard the evidence in a murder case. You haven't heard one stick of evidence so far, have you?

A No.

Q Just keep an open mind and tell us that you will follow the law and, if you hear a case that calls for the maximum and you think the right thing to do and the just thing to do, in other words, the proper thing to do is to give the maximum, you will give the maximum because you think he deserves it. Do you see what I'm getting at?

A Sure.

[3868] Q By the same token, you will keep an open mind and listen to all of the evidence in a murder case before you make up your mind anal don't prejudge anything and just say, if you hear a case that calls for five years and you think that's the right thing to do even though it may be few and far

between, if you hear a case that calls for the minimum and you know that's five years, you will give the minimum. Can you do that?

A Sure.

Q Any doubt in your mind about that?

A No.

Q Or anywhere in between, if you hear a case that calls for fifteen years, you will give that; twenty-five years, you will give that; fifty years. Can you do that?

A Sure.

Q Let me talk about one other thing. You understand that you don't have to imagine a situation where you would give five years or ninety-nine years or life?

A Right.

Q You've just got to say that you will keep an open mind. Will you do that?

[3869] A Right.

Q All right. The Judge will instruct you in regard to the law and the range of penalty for murder—this is kind of strange situation, Mr. Woods. The law tells you about what we all know a little bit about and that's about the fact that people charged and convicted of murder and go to the penitentiary get paroled, don't they?

A Right.

Q There is such a thing as parole and such a thing as getting good-time towards parole and so forth. The Judge will give you some lengthy instructions when you go back to deliberate a murder case about these things. He tells you that a person—you get to know about these things, about parole and good-time. Then as soon as he gets through tell you that, he tells you that, because you cannot adequately predict how soon someone is going to get a parole or how that good-time is going to enter into it, you cannot consider either goodtime or parole in deciding how much time a person ought to get for murder. Do you see what I'm getting at?

[3870] A Yes.

Q He tells you about it and then he says forget about it?

A Right.

Q That's not the Judge doing that. The Judge is just applying the law. You understand that?

A Yes.

Q In other words, you might listen to a murder case and say, well, under these facts I think he ought to get fifteen years or five years, but I think he's going to be paroled, so let's give him ten and then he will serve five years. That's a matter that comes up before the Board of Pardons and Paroles and the governor. It's really not your concern. Do you see what I'm getting at?

A Yes.

Q You just listen to the evidence that you have and you decide what the person ought to receive and not let the fact that a person could get good-time or parole. Can you do that?

A Yes.

Q Now, let me just ask you. Could [3871] you put aside your feelings—you said you had strong feelings about murder and murderers, that you think people who commit bad murders ought to get something more than the death penalty; is that right?

A Yes, sir.

Q How do you square that with your thinking that you can give five years in a murder case or fifteen years?

A I don't think that's fair to just give a person something like that for going out to take people's life.

Q Do you think you could listen to a case and give five years if you thought it was proper?

A Give five years?

Q Yes.

A I don't feel like it's the right thing to give a person five years when I feel like he should get more.

Q Now, you understand that you haven't heard any evidence yet?

A I know. I wouldn't give him five years without hearing the evidence.

Q You're not going to give anyone [3872] ninety-nine years or life either, are you, until you hear the evidence?

A No. Right.

Q Are you telling me, Mr. Woods, what you're going to do is, even though all murders are bad, you will take into account all of the circumstances surrounding the murder and wait until you've heard all the facts to see how bad the murder is and what the relationship was between the guy that did the killing and the guy that got killed, what their backgrounds are, you know all of the realistic things that you can consider that would make one murder worse than another and, if you hear a case that calls for five years, you will give five years and, if you don't think it's worth five years, you will give-ten years, fifteen years, twenty years and all the way up to ninety-nine years or life. Will you do that?

A Sure.

Q You understand that it may be a rare case where you're going to give five years and it maybe a rare case where you would give ninety-nine years or life, would you agree with me?

[3873] A Sure.

Q It may take particular facts to give five years and real rare facts to give ninety-nine years or life, but if you hear them, you will give five years if you feel that's the right thing to do? Am I reading you right?

A Sure.

Q All right. I think I'm about out of time, but let me just ask you this: You understand that Mr. Miller-El here is presumed to be innocent. You understand that?

A Sure.

Q We've got to prove his guilt. You understand that the indictment is no evidence of guilt? That doesn't mean anything?

A Right.

Q You understand, if he doesn't want to testify, you can't hold that against him?

A Sure.

Q He may or may not testify. I don't know, but if he doesn't, you can't go back and say, well—you can't even discuss that fact. You can't say, well, that guy didn't take the stand, so he must be guilty. [3874] How do you feel about that?

A I can't prove nobody is guilty until they're proven guilty.

Q You understand that the State has got to do the proving?

A Right.

Q Can you go along with that?

A Sure.

Q You understand that you don't automatically believe the testimony of a police officer. Would you?

A No, I won't automatically believe anybody.

Q You would just judge the witnesses as they come; is that correct?

A Right.

Q Mr. Woods, I'm about out of questions here. I'm out of time, more important than that. Your favorite TV show is Rawhide; is that right?

A Right..

Q Is that still on?

A Yeah, it's still on.

Q On Channel 39?

A Yes.

[3875] Q I've seen the Lone Ranger on Sunday mornings. Let me just ask you: Do you have any questions at all of me, Mr. Woods?

A No.

Q Do you know of any reason why you can't be a fair and impartial juror to both sides?

A No, I don't know no reason at all,

Q It boils down to this, Mr. Woods: If we prove to you beyond a reasonable doubt that the Defendant is guilty just as he is charged in this indictment of capital murder, do you know of any reason why you wouldn't find the Defendant guilty of capital murder?

A No reason.

Q If we prove to you that these questions should be answered yes, do you know of any reason why you would not answer each question yes knowing that it would result in this Defendant being taken down to Huntsville and put to death?

A No reason at all.

Q I appreciate it, Mr. Woods.

MR. MACALUSO: I'll pass the witness.

[3876] EXAMINATION

BY MR. CUNNING-HAM:

Q Mr. Woods, as you have been told, my. name is Cunningham and along with Mr. West, to my left, we represent Mr. Miller-El in this case. I would like to ask you some questions concerning your questionnaire and possibly some questions concerning what Mr. Macaluso has asked you about. This may seem like a ridiculous question, but this is for the purposes of the record. What is your race?

A Negro.

Q Where is Harbor Road located?

A Oak Cliff, South Oak Cliff.

Q Are you buying there?

A Bought.

Q You own the house?

A Right.

Q How long have you owned your own home?

A My wife had it when she and I got married.

Q How long have you been living there with her?

A Twelve years.

[3877] Q You work for Stewarts Contract?

A Yes.

Q You're an assembler?

A Yes.

Q You've been with them thirteen years?

A Right.

Q How long have you been a Cowboys fan?

A Ever since they've been the Cowboys.

Q What do you think about a Redskin fan?

A I never was a Redskin fan.

Q How often do you go fishing?

A I go fishing every weekend.

Q Where do you go fishing?

A Lake Lavon.

Q Do you catch anything there?

A They're not biting.

Q How long have you been a member of Porter Temper Church?

A My wife is a member. I'm really a Baptist and my wife, since she and I got married, has become a CME.

[3878] Q In other words, she converted you?

A Well, no. As a kid I grew up in the CME. When I moved to Dallas in '56, I become a Baptist.

Q After you got married, you went back to what you were at the very beginning?

A Right.

Q Are there any members of your family or close friends who are in law enforcement.

A No.

Q You've never been in the military?

A No.

Q Do you know of any reason why you couldn't be a fair juror if chosen in this case?

A No.

MR. CUNNINGHAM: Pass the juror.

MR. MACALUSO: May we have a few minutes, judge?

THE COURT: Surely. Mr. Woods, let me ask you to step out in the hail for just a few moments.

[3879] (Whereupon, Mr. Woods, left the courtroom, after which an off-the-record discussion was held, after which the following proceedings were held .)

THE COURT: Mr. Macaluso, what says the State?

MR. MACALUSO: We'll accept the juror.

(Whereupon, Mr. Woods returned to the courtroom and the following proceedings were held.)

THE COURT: Mr. Macaluso, what says the State, please, sir?

MR. MACALUSO: The State would be pleased to accept Mr. Woods as a juror on this case.

THE COURT: Mr. West?

MR. WEST: Your Honor, the defense would be pleased to accept Mr. Woods on this jury.

THE COURT: Thank you. Mr. Woods, let me do a couple of

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[55] CYNTHIA RAY YOUNG,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Good morning, Ms. Young. My name is Paul Macaluso and to my immediate left is Jim Nelson. You may recall yesterday there was another gentleman who was seated right where I'm pointing now and his name is Norman Kinne. Norman, Jim and I are assistant criminal district attorneys

here in Dallas and we represent the State of Texas in this particular case. We're the lawyers for the State.

To Jim's immediate left is Mr. Brice Cunningham and to Mr. Cunningham's immediate left is Royce West. They're the lawyers who have been appointed to represent the accused Defendant in this case and his name is Thomas Joe Miller-El. He's seated to their immediate left in the light blue suit over there. Can you see him from where you're sitting?

* * * *

[59] with your personal feelings about anything. You understand the very serious nature of what we're about here today and I think you understand why we absolutely need to know some things about your background and how you feel generally?

A Yes, sir.

Q Now, let me start off by telling you exactly what the State's position is in this case. The Judge foreshadowed some of this yesterday. We are actively seeking the death penalty in this case for Mr. Miller-E1. I just want to put you on notice of that right at the very beginning so you will know exactly where the State stands with regard to this case and this Defendant because we intend to be able provide a jury, once it's selected—and, of course, that would mean you, if you're on the jury, and eleven others—with both the type and the quality of evidence that would convince them in the first part of the trial beyond any reasonable doubt whatsoever that that man is guilty exactly as he is charged in this indictment and nothing less.

In the second phase of the trial, [60] once again, to be able to provide that jury with the type and quality of evidence that would convince them beyond any reasonable doubt whatsoever that all those questions, whether they be two or three, as it turns out, should be answered yes. You know the result is that the Defendant would automatically be sentenced to

death under the laws of this state. That's our position. Of course, they have their position and they're entitled to that. Ultimately it's up to the jury to decide, but we want you to know going in what our position would be based on the evidence that we intend to present. Okay?

A Yes.

Q Now, just to get those preliminary matters out of the way, let me just ask you -and it really boils down, I guess to a large degree in any case, to some of the questions you've already answered here on the second and third from the last page of the questionnaire. Let me ask you: Even though you had little time to do that yesterday, really, and certainly little time to think about it. You've had overnight, but let me just ask you [61] if you, at this point, would share with all of us your personal feelings on the death penalty and then, secondly, your ability or inability to serve on this type of case, if you're called upon, as a juror?

A Well, I believe in the death penalty if a person is found guilty in a capital murder case. For me to arrive at that decision would not be easy. It would be a very heart-felt decision and something that I would not come to easily. But if I believed the Defendant was guilty of the crime, if the evidence was presented and I found him guilty, then—the degree and seriousness of the crime, then I could give the death penalty, but it would not be an easy decision, but it's one I could make.

Q Let me ask you this: I gather from what you're saying that you feel the death penalty is proper under certain circumstances?

A Yes. I don't believe, like I said, in an eye for an eye, but you also have to look at the crime itself.

Q I gather from what you're saying that you think it should be reserved for very

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[86] DENNIS W. MERRELL,

called as a jury panel member, having been duly' sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Good morning, Mr. Merrell.

A Good morning.

Q Let me begin, by reintroducing everyone here at the counsel table. My name is .Paul Macaluso. To my immediate left is Jim Nelson.

MR. NELSON: Good morning.

Q Mr. Merrell, you may recall yesterday when we were all introduced to you, there was another gentleman seated over here and his name is Norman Kinne. He will actually be presenting the evidence on behalf of the State of Texas, if you're a juror on the case, but Mr. Kinne, Jim and I—actually it's Norman. I call him Mr. Kinne. We're assistant district attorneys in Dallas. We're assistants to Henry Wade and we've been designated as the lawyers to represent the State of Texas in this

* * * *

[90] case, okay?

A Okay.

Q So, relax, if you have a question, ask it. If there is a statement that you wish to make at any time, make it, okay, whether I'm talking to you or when I'm through and the other lawyers are talking to you.

Now, let me just tell you what our position is at the outset here, that is the State of Texas. The Judge foreshadowed some of this yesterday, but I want to make our position completely clear, all right?

A Okay.

Q We, that is the State of Texas, are actively seeking the death penalty in this case for this Defendant. We make no bones about it. We want you to know what our position is based on the evidence at the very outset. In other words, we intend to be able to provide you, if you're a juror on this case, as well as eleven others, with both the type of and the quality of evidence that would convince you beyond any rea';onable doubt that that man is guilty exactly as he's been indicted and charged in this indictment. [91] That's done in the first part of the trial. In the second part of the trial, once again, we intend to provide a jury with the type and the quality of evidence that would convince them beyond any reasonable doubt whatsoever that all of the questions that will be submitted to the jury in the second part should be answered yes, which you know automatically results in a sentence of death.

MR. WEST: Your Honor, I'm going to object to the improper voir dire pursuant to Article 37.07, subsection G, wherein the code is very specific and I think it should be taken up outside the presence of this juror.

THE COURT: Okay. Mr. Merrell, let me ask you to go out in the hall for just a moment, sir, while we resolve this law question.

(Whereupon, Mr. Merrell left the courtroom, after which the following proceedings were held.)

* * * *

[94] MR. MACALUSO: I don' t believe I did. I never have, Judge.

THE COURT: They may be told what the effect of an agreement is either way or, I should say, a failure—if they vote no, then a life sentence would result. I understand your objection, but I'll overrule it at this point.

MR. WEST: Note my exception.

THE COURT: Bring Mr. Merrell back, Bob.

(Whereupon, Mr. Merrell returned to the courtroom and the following proceedings were held.)

THE COURT: Go ahead, Mr. Macaluso.

Q I've almost forgotten where we left off. I believe I was just telling you basically, Mr. Merrell, what ovr position is in this particular case. I said our position, of course, would have to be based on the evidence. [95] I just wanted to tell you what our position is at the very start of the trial; that we are actively seeking the death penalty in this particular case. Ultimately, of course, it's entirely up to the jury to make that decision.

Now, first, we have this questionnaire that you've completed and that, as the Judge said, saves us a great deal of time. Before we go any further than just my preliminary remarks, let me just ask you—I know you've already answered this in the brief time that you had and in the brief space that you had, but would you share with us at this point, number one, your personal feelings with regard to the death penalty or capital punishment and then, secondly, your ability or inability to actually serve or participate in making a decision on this type of a jury?

A Okay. My personal belief on the death penalty is that it does serve a place in this society. I think it is taken care of by the majority of the people that have made this a law and I go along with that being part of this society. What was the second part of your question, again?

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[104] DONALD J. HAMBRICK,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Good afternoon, Mr. Hambrick. Let me begin by reintroducing everyone here at the counsel table. My name is Paul Macaluso and to my immediate left is Jim Nelson.

MR. NELSON: Hi.

Q You may recall that we were introduced to you, along with Norman Kinne, who was seated right here. He will actually be presenting the evidence on behalf of the State once the trial begins. Norman Kinne, Jim Nelson and I are all assistant criminal district attorneys here in Dallas and we've been designated as the lawyers to represent the State of Texas in this particular case. Now, to Jim's immediate left is Brice Cunningham.

MR. CUNNINGHAM: How are you, Mr. Hambrick.

MR. HAMBRICK: All right.

* * * *

[107] feelings about the death penalty, capital punishment, all sorts of things, to answer up in front of a bunch of strangers, it might be a little bit inhibiting.

A Yes.

Q So the law allows us to talk to you in this relative degree of privacy. We want you to, as the Judge said, relax as much as you possibly can. Of course, bear in mind that there are absolutely no right or wrong answers to any of the questions you're going to be asked here. Just tell us how you feel. We're going to rely, to a large degree, on you, also, to just tell us, if there's something about your background or your feelings about this type of case that we need to know about, in fairness to both sides, okay?

A Okay.

Q If you have a question, by all means ask it at any time. I know I speak for the other lawyers when they talk to you, as well. If there is something that you would like to tell us about it, just tell us, okay?

A Okay.

Q Now, let me tell you right off [108] what our position is with regard to this case. Mr. Hambrick, I want you to know from the very outset here, so it comes as no surprise to you if you're selected as a juror, that the State of Texas is actively seeking the death penalty in this particular case for this Defendant. We're not trying to hide the ball or trying to surprise you later on, if you're on the jury. That's our position. In other words, we intend to be able to provide to you and eleven others, if you're on the jury, both the type as well as the quality of evidence that will convince you beyond any reasonable doubt whatsoever that that man is guilty exactly as he is charged in this indictment.

Then in the second part of the trial because the trial is divided into two parts, once again provide you and the other jurors with the type and the quality evidence that will convince you beyond any reasonable doubt that those questions should be answered yes. You know, if they are all answered yes, whether there be two or three questions, then the law requires the Judge to assess a sentence of death. It's automatic and [109] the Judge has no leeway in it. Do you understand that?

A Yes.

Q Okay. Now, that's our position and I'm sure they have a different position. I'm confident of that. Ultimately, of course, it doesn't matter what our position or their position is. It matters what the jury decides on the basis of the evidence. Am I making myself clear?

A So far.

Q Now, with those preliminary remarks—by the way, let me also say one more thing. No one is going to try and talk into or out of a position. No one is going to argue with you or

quarrel with you about any honest or conscientious feeling that you have about anything.

A Okay.

Q So don't be afraid to speak your mind on any subject, all right?

A All right.

Q Now, we know you've been asked this question on the questionnaire and you have answered it, but we know you were given [110] precious little time, really, on a pretty weighty subject. Let me ask you if you would share with us at this time, sir, once again in your own words, how you feel generally about the death penalty and capital punishment and then your ability to serve and actually participate in this type of a case as a juror?

A Okay. Like I said on my questionnaire, you know, I believe, if somebody takes a person's life, based on—if I'm a juror, based on the facts—you know, if it comes to the point that the death penalty is the proper punishment, then that's what he or she will get.

Q I gather from what you're saying that you do believe the death penalty has a purpose or serves a purpose in our society. How do you view it in that regard; do you think it serves a particular purpose or fulfills a particular need?

A It fills a particular purpose.

Q flow do you view that? In what particular manner? Like some people say, well, it acts as a deterrent, you know, maybe gets people who might be thinking about committing a

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[130] who you are and where you live." That might not be an excuse to murder, but you can see, if I hadn't said that, maybe Mr. Nelson wouldn't have shot me. Do you see?

A Yes.

Q Okay. Even though it's provoked doesn't mean you automatically answer the question no. You decide whether or not there was provocation and was it reasonable or

unreasonable because of the person's death. Do you see? You might say, I don't care if he said he could identify him. That's unreasonable for him to kill him, in which case you answer the question yes. Do you see what I'm getting at?

A Yes.

Q It's a little bit confusing, but if it's unprovoked, you answer the question yes and again, as I said earlier, you may not even receive that with those questions. Do you have any questions at all about the three questions?

A No

Q Okay. Let's shift out thinking for just a second here and shift away from what we've been talking about, capital murder, and [131] go back to murder. There's a situation that could arise and I'm not suggesting that it would arise in this case or any particular case, but it's a possibility that we need to discuss with you at this point. Imagine for a moment that you're on this hypothetical capital murder jury. Let's say instead of murder during a robbery, as we've alleged in this particular case, let's say the case involves a murder during a burglary which, as you know, is another type of capital murder. Let's say in the first part of the trial you were satisfied, along with the other *jurors, beyond* any doubt at all that A, the Defendant, killed B and it was murder, but let's say you had some reasonable doubt where you just didn't believe that the offense was in the course of committing a burglary. Well, you understand that we have to prove both a murder and burglary if we expect you to find the Defendant guilty of what we've charged him with which is capital murder? Do you see what I'm getting at?

A Yes.

Q We haven't done that in that [132] situation, have we?

A Not yet.

Q Okay. If that were the situation, you would have to find the Defendant not guilty of capital murder because we

didn't prove that. We didn't prove the burglary aspect. Instead, you find him guilty of what we did prove, which would be murder.

A Right.

Q Let's assume we did that. No longer, you understand, is it just automatically death or automatically life. Do you see? Instead, the range of penalty is as broad as it is for any offense under the laws of this state. Really, it's up to you as a juror in a situation like that basically to tailor the punish}lent to fit the facts, the Defendant and the crime as you decide it to be and that's all we're asking you to do. In other words, you listen to all the evidence and don't prejudge anything. If you feel, for example, that after hearing all of the evidence—and obviously you haven't heard stick of evidence thus far, have you?

A No.

[133] Q You wait over there and you listen to all of the evidence in your murder case now and, if you feel that the facts call for it and warrant it and justify it, you would have to give the minimum if you felt that was proper to your way of thinking. If, on the other hand, you heard a fact situation and you learned about the Defendant in an offense that you feel calls for and warrants and justifies and where you feel the right thing to do would be to give the maximum, you would do that? Any problem with that at all?

A No.

Q Okay. The range of penalty for murder, regular murder, not capital murder, is as low as five years all the way up to ninety-nine years or life in the Texas Department of Corrections and an optional $10,000.00 fine. Do you know of any reason, sir, why you couldn't assess a penalty somewhere within that 21 range?

A No.

MR. CUNNINGHAM: If the facts and circumstances called for it, Your Honor.

[134] MR. MACALUSO: Yes.

Q That's what I'm saying, of course, where the facts and circumstances called for it and warranted it and you—

A If they called for it, I think I could.

Q Okay. Now, I don't know if the judge covered this. I don't think he did, but a conviction, whether it be for capital murder, murder, or any other offense that I know of other than treason, I think, can be had on the testimony of one eyewitness to the crime if a jury believes beyond a reasonable doubt the testimony of that eyewitness. In other words, you can in certain types of crimes that there may only be one remaining witness, a rape case, for example. A lady that's been raped and she identifies somebody, the law says if you believe that individual, whether it be a rape case or a murder case, beyond a reasonable doubt, the person who identifies somebody, you can base a verdict on that. There is any reason why you couldn't do that, Mr. Hambrick?

A Well, I'm not going to base my—you know, my basic conviction on just one

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[152] EMILY C. WILLIAMS,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. NELSON:

Q Hi, Ms. Williams. My name again is Jin Nelson as I was introduced to you want to take just a couple of minutes to reintroduce everybody who is sitting here. Beside me is Mr. Paul Macaluso. If you will remember yesterday, we were introduced to you as a group and sitting right about there was a gentleman by the name of Norman Rinne. Mr. Kinne, Mr. Macaluso and myself are all assistant district attorneys here in

Dallas. We were assigned by Mr. Wade to handle this particular case and that's what we're going to do. Mr. Macaluso and I will pick the jury and Mr. Rinne is going to be responsible for putting on most of the evidence.

To my left is Mr. Brice Cunningham.

MR. CUNNINGHAM: How are

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[155] you think we can do that?

A Yes.

Q Okay. Are you starting to relax a little bit?

A Yeah.

Q Okay. Good. Now, as I've mentioned and you've heard three or four times already, this is a capital murder case and I want you to know right now up front as we, go into this that the State of Texas is going to actively seek the death penalty for this man sitting at the far end of the counsel table in this case. We feel like and we plan to present evidence to you that will convince you beyond a reasonable doubt that he's guilty of the offense of capital murder and that the three questions on those boards right there should be answered in the affirmative with a yes answer. Three yes answers there result in the death penalty under the law of the State of Texas. I feel like you have a right to know going in what we're planning on doing and what our opinion is in this case.

Ms. Williams, I noticed on your information sheet that you filled out here [156] yesterday that you answered a little bit on the death penalty your feelings, but I know you didn't have much time to think about it and you were kind of under a pressure situation at that time. I hope you've had a chance to think about it a little bit more overnight. I'm just going to ask you right now what your feelings are about the death penalty. Are you in favor of it or against it? How do you feel about it?

A I'm in favor of it.

Q Okay. You understand, I think, Ms. Williams, from the things that the lawyers have said that there are certain situations where the death penalty is deemed proper under Texas law. Number one, just a plain murder, knowingly or intentionally causing the death of another individual is not a death penalty offense in this state. It has to be coupled with certain situations. For example, it has to be the killing of a police officer or a fireman in the lawful discharge of his duty or the killing of more than one individual, which is a new law that was just passed this last year. It can also be certain situations where, if it's a killing in conjunction with a robbery

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[176] just on emotion say, well, this man deserves to die for what he did. You have to answer each of those three questions based on the facts that are brought to you. Do you feel like you can do that?

A Yes.

Q Do you feel like, if we didn't prove to you that one of those was true, you could answer it no?

A Right.

Q I think what you told us before, you're going to have to hear the evidence before you could make that decision; is that right?

A Yes.

Q I think that's all either side is goi-Ig to ask you to do, ms. Williams, is listen to the evidence and make a decision as to these facts based on that evidence, okay?

A Okay.

Q Now, there may be a situation—we don't anticipate it in this case, but there may be a situation where capital murder is not proved, but murder is proved. Do you remember I talked about if we don't prove committing [177] or attempting to commit robbery, then it's just a simple offense of murder?

A Yes.

Q The range of punishment in that case would be anywhere from five years up to ninety-nine years or life and you could assess an optional fine of up to $10,000.00. Now, in order for you to be qualified to serve as juror, you have to tell us that you could consider that entire range of punishment if the person were found guilty of murder rather than capital murder. You understand that there can be several levels or different types of murders, several different ways that a death of a person can result. Do you feel like you can consider anywhere from five years up to ninety-nine years or life for the offense of murder?

A Yes.

Q Okay. You don't have any problem with that then? If you feel like five years is called for and justified by the circumstances, you could assess that and, if you feel like life or ninety-nine years is called for and justified by the circumstances, you could assess that?

[178] A Yes.

Q Okay. Now, you understand also, Ms. Williams, that we don't have to prove to you motive or premeditation in any murder case. That's not an element in a case. You know, you watch on TV and they talk about motive or was it premeditated, so that makes it first degree murder and so on and so forth, but we don't have to prove that in Texas. We don't have to prove what the motive was for the killing and we don't have to prove any type of premeditation. Do you have any problem with that?

A No.

Q Okay. We've talked a lot about evidence and about how you're going to have to base your verdict on the evidence and obviously that's what we want you to do. You can't make a decision sitting there right now because you haven't heard anything yet. That evidence is going to come from witnesses on the witness stand and you're going to have

to judge the credibility of those witnesses. What we ask you to do there is give each witness an equal starting point. I envision it kind of like

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DAROL L. WEIGANT,

called as a jury panel having been sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXMINATION

BY MR. MACALUSO:

Q Mr. Weigant, let rye begin by reintroducing everyone here. I'm Paul Macaluso. I'm an assistant criminal district attorney along with Jim Nelson to my immediate left. You may recall that Norman Rinne was seated over here yesterday we were all introduced to you. I don't believe we've ever met. I know you work for the sheriff's office, but I don't believe we've ever met. We may have seen each other in passing in the halls.

A I've never see you.

Q All right. You know that we work for the district attorney's office and we represent the State of Texas in this particular case. We're the lawyers for the State, as you well know. To Jim's immediate left is E. Brice Cunningham.

MR. CUNNINGHAM: How are

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[203] charged with capital murder, as I'm sure you know, can receive only one of tyro possible penalties, life or death. It depends on the answers to the questions and the way the jury decides to answer them.

We are actively seeking the death penalty in this case, Mr. Weigant. That is, we intend to be able to provide a jury with the type and quality of evidence that is going to convince

them beyond a reasonable doubt that the Defendant is guilty in the first part of the trial and in the second part, provide them with the type and quality of evidence that will convince them beyond a reasonable doubt that the questions all should be answered in the affirmative, yes, yes, yes in each case, which as y-au know results in the Judge assessing a sentence of death. Now, the jury may disagree with this. That's why we have a jury up here. That's our position and I think it is only fair to you, certainly, and to anyone else who is a prospective juror in this type of a case to more or less acquaint them with or put them on notice of what our position is relative to the evidence bearing in mind naturally that it is [204] up to you and the eleven others that will be on this jury to make that ultimate decision. There will be two decision, actually.

Now, you've indicated here on question fifty-six—and there are only three lines provided there for you to express your feeling about the death penalty and then two or three other questions about whether or not you could sit on this type of a jury and you answered those. Could you share with us your personal feelings about the death penalty and your ability to actually serve on this type of a case and actually make those decisions that might result in the execution of this man right down there? How do you feel about the death penalty? I know you said you believe in an eye for an eye and you believe it's a deterrent.

A I believe that they should have the death penalty for any premeditated murder.

Q All right. You understand that's not the law?

A I know that.

Q Let me just hit on that while we're on it. There are some aspects of the law that I don't agree with and I'm sure there are

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[228] that would be true, also. You could be on a case and hear a fact situation where you personally don't think that individual ought to receive—you know, if you could vote directly, you would say, "I don't think that person ought to get the death penalty.", but when you come to analyzing the evidence, let's say it does fit, the evidence actually fits those questions like a glove, each one of them was proven to you beyond a reasonable doubt to be yes. Do you see that would be contrary—

A I would have to answer yes.

Q Even though you personally desire a life sentence, if you could do it that way?

A If they were all yes. It would have to be yes or I couldn't.

Q Well, you would be guided by the evidence as to whether it called for a yes or a no answer?

A Yes, sir.

Q Let me shift gears here for one second. I know the Judge is looking at me and I don't blame him because I'm going over my time limit. Let's shift our thinking for one second to two matters. One is a situation here [228] where, if you're on this imaginary jury, let's say you have heard all the evidence in a capital murder case and let's say it's murder during a burglary, all right? Let's say you're satisfied that A killed B and there's no doubt about it, but let's say you didn't hear any evidence about the burglary at all or you had a reasonable doubt about that, all right? You understand for you to convict someone of capital murder, we have to prove both aspects of capital murder, both the murder and the burglary?

A Yes, sir.

Q All right. We didn't prove the burglary, did we?

A No, sir.

Q All right. So you can't convict him of capital murder. Instead, you convict him of what we did prove, which was what?

A Murder.

Q If you did that, then you forget about mandatory life sentences or death. It's a first degree felony murder and all the law expects you to do in a situation like that, in a murder case, is to be open-minded and do [230] what you've told us you would do already and that's simply say, "I will listen to all of the evidence in a murder case and, if it's a proper case, after I've heard the evidence, that I feel calls for a particular type of punishment to my way of thinking after I've heard all the evidence, then that's what I will give. If it is what I think calls for the minimum, I'll give the minimum. After I've heard all the evidence, if I think it is proper and just and the right thing to do to give the maximum, I'll give the maximum, whatever it may be. Can you do that?

A Yes.

Q Now, you know that the range of penalty for murder is as little as five years up to ninety-years or life. You don't have to imagine a case that would call for five years or one that would call for ninety-nine years or life, but are you able to tell us that, if you see a fact situation in a murder case that, to your way of thinking, calls for the minimum, you could give, five years in the Texas Department of Corrections for murder? If you see one that calls for ninety-nine years or [231] life, you could do that as well and even add on a $10,000.00 fine? Can you do that?

A Yes, sir.

Q In other words, you will wait until you hear all the evidence?

A Yes, sir.

Q One other thing and then I'll let the other lawyers talk to you. Obviously, we discussed earlier that you are a sheriff's deputy. I anticipate that there will be other law enforcement officers testifying. You do not apparently know or think you know any of these? You understand that the law expects any juror to judge any witness by the same yardstick regardless of that witness' station in life, occupation, the color of their clothing, color of their skin or anything else?

A Yes, sir.

Q Can you do that?

A Yes, sir.

Q In other words, you know as well as I do. You've worked with law enforcement officers and you know they're capable of telling the truth and, I guess, some of them are capable of lying because they're just human

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[273] RODERICK R. BOZEMAN,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Good morning, Mr. Bozeman. Mr. Bozeman, let me begin by reintroducing everyone here at the counsel table. My name is Paul Macaluso and to my immediate left is Jim Nelson.

MR. NELSON: Good morning.

THE WITNESS: Good morning.

Q You may recall being introduced the other day to Norman Kinne. He was seated over here to—it would have teen your far right at the time. The three of us are assistant criminal district attorneys here in Dallas and we work for Henry Wade who, I'm sure you know, is the district attorney. We've been designated as the lawyers who will represent the State of Texas in this particular case.

Now, to Jim's immediate left is Mr. E. Brice Cunningham—

[274] MR. CUNNINGHAM: How are you?

THE WITNESS: Good morning, sir.

Q —and to Mr. Cunningham's immediate left is Mr. Royce West.

MR. WEST: Good morning, sir.

Q You may also recall being introduced to them. They are the defense attorneys who have been appointed by His Honor Judge McDowell to represent the accused Defendant in this case. His name is Thomas Joe Miller-E1. He is at your very far right in the powder blue suit.

The reason why I've taken the time to reintroduce you to everyone here is to let you hear our names again. I want to ask you if you recognize any one of us or have heard of any one of us other than common introductions?

A No.

Q Okay. Of course, I also did that to reacquaint you with the roles that we are playing in this particular case.

Now, as you know, at this [275] particular point, Mr. Bozeman, you are a prospective juror in this capital murder case. Mr. Miller-H1 is charged by indictment with the offense of capital murder, the most serious level of offense under the laws of this state. That is, it's serious because of the nature of the offense, of course, capital murder, and it's serious because of the two possible penalties a person can receive if he or she is convicted of this offense. Okay?

As you well know, if a person is convicted of capital murder, they can receive either only a sentence of death or a sentence of life. Because of that, the law basically allows us to talk to you individually such as we're doing now.

Have you been down here on jury duty before?

A No, I haven't.

Q If you had, and you had been called on in any other case other than a capital murder case, the lawyers would have an opportunity to talk with you and ask you certain questions, but the conversation that you would have with the lawyers

would have been [276] conducted while you would be sitting out there in the gallery much as these people are and as much as you were on Monday. The answers you give would be the answers you would give in the presence of forty or fifty virtual strangers. All right?

A Yes.

Q You can see how it might kind of make you a little bit nervous or inhibit you or not relax you as much as we want you to be, so they let us talk to you individually because it's a little bit more quiet. I imagine, after a period of time, some of these people will—won't be out there and we will be a little more relaxed. Let me invite you to do that, relax as much as you can, and take a deep breath if you're a little bit nervous.

Let me remind you of something that the Judge said earlier. There are no right or wrong answers to any of the things we're going to be talking about. You're not here to please anybody and no one is going to argue with you or quarrel with you about anything or talk you into anything or out of anything. Your feelings, your impressions, and [277] your position, basically, are the things we're going to talk about and are the most important right now. We want to know how Mr. Bozeman thinks. It doesn't matter what we think. We want to know how you think, okay?

A Yes.

Q If you have a question about anything, Mr. Bozeman, by all means ask it because this is the time that you get to do that, all right? If there's a statement you would like to make or something you feel that you need to tell us in fairness to both parties here, then by all means do that, too. Will you do that?

A All right.

Q Okay. Let me tell you what our position is right from the outset here. Sir, we are actively seeking the death penalty in this case for Thomas Joe Miller-E1. I want to let you know that from the very outset so you know exactly where we stand

and what our position is going to be with- regard to the evidence that is presented. We are actively seeking the death penalty in this case and that means that we intend to provide a jury, once [278] it's selected, with both the type and the quality of evidence that will convince them beyond a reasonable doubt that the Defendant is guilty just exactly as he's charged.

Then in the second part of the trial where the punishment is determined, either death or life, we once again intend to be able to provide this jury with the type and the qualify of evidence that would convince them beyond any reasonable doubt that these questions that make that determination should be answered yes.

You know that three yes answers or all yes answers, that equals an automatic and mandatory sentence of death. Now, that's why I'm just telling you from the very outset, as we're going to tell all the prospective juro-s, what our position is so it wouldn't come to you as any surprise if you're actually on the-Jury.

You understand that, ultimately, it's the jury's decision, not our position or their position, that really counts. Okay?

A Yes.

Q Now, Mr. Bozeman, I know you've been asked this question here on the [279] questionnaire and, as the Judge said, this saves us a great deal of time because otherwise, we would probably have to ask you all these questions and tie you up for much longer than you would want to be tied up. Let me ask you at this point if you would share with us, sir, in your own words, your feelings generally about the death penalty and capital punishment and how you personally feel about it and then, secondly, if you would share with us your feelings about whether you could actually serve on this type of a jury?

A Well, as far as the death penalty is concerned, I think it would, you know, depend on the circumstances involved in what happened, you know, whether I could say I would actualli vote for that or not. Yes, I think I could, but, you know, I don't really know at this point. I'm sure I could, but as far as the death penalty is concerned, I would have to know, you know, the circumstances surrounding it.

Q Let me just ask you, as a general proposition, how do you feel about the death penalty? I understand what you're saying, it [280] would depend on the facts and circumstances, but as a general proposition, how do you view the death penalty, how do you feel about it? I mean, do you think it serves a purpose in our society? Do you think we ought to have it?

A Yes, it does.

Q What sort of purpose do you feel it serves?

A Well, I think if there's no possible way to rehabilitate a person and he is harmful to society, you know, the State has that right, I feel.

Q You said, if there was no possible way to rehabilitate somebody. Let me ask you: What would be some indication to you, Mr. Bozeman, that someone was beyond rehabilitation?

A Oh, I would say somebody mentally disturbed or something like that or say a Manson type or something like that.

Q Would, for example, repeated criminal violent conduct be some indication to you, sir, that the person was beyond rehabilitation?

A No, not really, It would, I [281] guess, depend on the extent of the crimes that he has committed and if they were, you know, violent crimes over a period of time, different—yes, I believe that it would.

Q In other words, if you see a pattern developing, let's say, in a person's life where he tends to commit violent offenses when released into society, do you feel that is the

type of person that you would be able to decide is perhaps not even worthy of or capable of being rehabilitated?

A Yes.

Q Now, let me set out a proposition here. I hesitate to do this because I don't like to pidgeonhole you, but sometimes it serves a purpose. With regard to the death penalty, we've found basically that we could probably categorize people generally speaking in three categories, and in no particular order. Let's say a type of individual who believes in the death penalty and also believes—knows himself well enough to know that they could actually serve on a jury and, if the situation called for it, could actually make a decision that would result in someone [282] actually receiving the death penalty. They believe in it and they could actually implement it, in other words, on a jury.

Let's say another class of individual, again in no particular order, believes in the death penalty as a proposition, but let's say when it comes to them actually serving on a jury, because of their personality or their temperament or whatever it may be, whatever the fact is, they just don't feel they could actually be the one to do it, could actually make the decision. They agree with it when they read about it in the paper and they agree with the philosophy, let's say, but they couldn't actually serve on the jury.

Let's say there's another class that doesn't believe in the death penalty and could never serve. I gather you're not in the third category, but do you see yourself either one of the first two?

A Oh, probably more the second group, I guess.

Q All right. We need to talk about that just a little bit. Mr. Bozeman, let me explain something here so it doesn't sound like [283] I'm rattling on endlessly and covering the same thing repetitiously. When we talk, no matter what we're talking about, and I'm asking you questions and you're answering, you're really talking to everyone here. You're

certainly talking to the other lawyers and you're certainly talking to the Judge and, of course, to the court reporter who is taking down everything in this case for appeal purposes, okay, so it's necessary, legalistically speaking, that I ask some things and you'll say, "Why does he keep asking that?" or "Why does he keep going over that? He's repeating himself." or "Haven't I made it clear?" You may well have, but the law simple requires that we go into very tedious and minute detail on some of these things. The lawyers are already tired of hearing me talk and I know the Judge is, but it's really more important that you talk. When I ask you questions, it's very important that you—I don't know how to put this delicately—not equivocate in your answers. If you *can* answer something yes or no, that's certainly the best way. Okay? I'm not trying to force you to answer, but do you [284] understand that it is very difficult for the Judge to make certain decisions in regards to a juror's service if someone says, "Well, maybe I could." or "I probably could." or "I possibly could." Do you see what I'm getting at?

A Yes.

Q Now, I'll give you all the time you need to think about any answer that you're going to give, okay?

A All right.

Q I know it's kind of confining, isn't it, but it's just necessary. All right?

A All right.

Q Now, you said that you see yourself fitting more into that second category. Is that because—we've already discussed how you feel about the death penalty. Is it because of your possibly serving or hesitance to serve on the jury itself, or just what is it?

A No. It would be actually the weight of, I guess, thinking about the death penalty and that would be the real thing behind it, I guess. I wouldn't have any problem serving on the jury, I don't think.

[285] Q You think you would have some problem?

A No, I don't think I would.

Q Oh, you don't think you would. Okay. Well, here's the thing. We have to rely—every one here has to rely on every thing you tell us and when you say—again, when you say probably, I know that's probably how—you see, I just said it there. I guess that's how I would answer the question, too, if I had some reservations, but every one here has to rely now on what you're going to do, within the law, of course, and based on the evidence back when you're on the jury. It would be terribly unfair to either or both sides, if some prospective juror said, "Well, maybe I could do this," or "Maybe I could do that," and then to find out later on that person couldn't do that, you know, under the law, follow the law, when they're actually on the jury. We've got to rely now on what you say. Are you saying that you feel you could?

A Yes, I could.

Q All right. Again, I want you to understand that I'm not trying to talk you into [286] any position, okay?

A No.

Q So you feel that you actually could serve on this type of a jury?

A Yes.

Q And understanding now that 'in years past with regard to the death penalty—I think you know and it's common knowledge that for many, many years—I say many, many years, ten or fifteen years, maybe more than that—no one was executed, I believe anywhere in the United States for about ten or fifteen years even though death penalties were handed down—

MR. CUNNINGHAM: Your Honor, we'll object to that. What the law was ten or fifteen years agohas no relevance to what we're doing right now.

THE COURT: I'll overrule, Mr. Cunningham. I think you're making a good point, though. Overruled.

Q The point I'm trying to make is, we would expect, as I'm reasonably sure you [287] understand at this point, if a verdict were to result in this case of a sentence of death, a juror should realistically expect now in 1986, that that sentence would be carried out, whereas years ago, you might have been on a jury and said, "Well, they're not executing anybody. You know, we're getting death penalty cases and hand down a verdict, but no one is being executed." You know, it's kind of like who cares or what's the difference, he's never going to be executed.

Do you understand that you should reasonably expect that, if you were to return a verdict that resulted in the death penalty, Mr. Miller-H1, in this case, would be taken to Huntsville, Texas at some point in time and given a lethal injection and executed under the law. I think you understand that, do you not?

A Yes.

Q I mean, the seriousness of the situation?

A Yes, sir.

Q Knowing that, do you feel you. still could serve on this type of a case?

A Yes, I could.

[288] Q All right. Now, let's talk a little bit about capital murder. You understand, when we talk about murder, the offense of murder is part of the offense of capital murder. Let me explain that. We have an offense known simply as murder under the laws of this state. Murder is a situation where one person, knowingly or intentionally, causes the death of another individual and that's done without any legal excuse or any legal justification, murders—murder all right? But not all is not a capital offense. You can't receive the death penalty in Texas just for murder. Am I making myself clear, Mr. Bozeman? To be eligible for the death penalty, you must

commit murder under a certain set of circumstances or you must murder a particular class of individual. I'm sure you know some of what I'm talking about.

For example, if I murdered – if you murdered me outside in the hall here because we get in an argument, you couldn't receive the death penalty for that or vice versa, if I killed you. All right? Now, if I was a police officer or a fireman in the line [289] of duty, that's a capital murder. Do you see what I'm getting at—

A Yes.

Q —or if you kill a jail guard or you kill someone while you're escaping from a penal institution, a jail or penitentiary, things of that nature. If you kill a number of people in one episode, that's a capital murder. If you kill someone for hire, it's capital murder. if you commit murder also in conjunction with the commission of another very serious felony, such as we've alleged here, murder during a robbery—in other words, murder plus, murder during a burglary, murder during a rape, arson, kidnapping—do you see what I'm getting at?

A Yes.

Q Murder plus. We have to prove both the murder and the aggravated offense, robbery, burglary, rape and so forth. Then murder, which is a first degree felony, is then elevated up the level of a capital offense for which you receive only the death sentence or a life sentence depending on certain factors.

Now, let me ask you: How does that square with your way of thinking, sir, [290] generally of what a death penalty case ought to be, depending upon the facts? Do you think those are the types of offenses that you feel, depending on the facts and circumstances, the Defendant's background, the way the crime was committed—do you feel those are the types of cases that the death penalty ought to be in order for or would you add to that or subtract from it, would you modify it in some way?

A No, I would say yes. Yes, those are the offenses.

Q Okay. Would you add to that? I know you've given it some thought, but do you think you would add something to it? Some people say, "Well, they ought to get the death penalty for sexually abusing little kids.", you know, at least the possible death penalty for it, maybe not in all case, but it ought to be available, or selling dope and getting little kids hooked on heavy dope or beating up and abusing old people and stuff like that.

A I don't believe those should be.

Q Okay. Would you pretty much limit it the way it is?

A Yes, I would.

[291] Q All right. Now, you understand that the trial of a capital murder case is conducted pretty much in the same fashion as any other case, any other criminal case. That is, it's conducted in two parts. The first part deals only with whether the person is guilty or not guilty. The State has the burden of proof. We must convince you beyond a reasonable doubt that the Defendant is guilty, in which case, you find him guilty. If we don't prove that, you find him not guilty. It's as simple as that. If you find him not guilty, the trial is over and everybody goes home. If, on the other hand, you're convinced beyond a reasonable doubt that the Defendant is guilty of capital murder as he's charged here, then we go on with the sec'.)nd part of the trial. You may hear additional evidence to aid you in the second part of the trial and you may not. Either side or both sides can bring you additional evidence, but no one is under any obligation to bring you any additional evidence. You may be in a position where you would decide the answers to the questions, which we'll talk about in a minute, on the [292] basis of the evidence that you received in the first part of the trial because the law does allow you to do that.

Now, the second part of the trial, under the old law, up until about fifteen years ago, I guess it was, or somewhere around there, after the jury heard all the evidence, the jurors

would go back and actually directly decide should a person get the death penalty, should they get a life sentence or should they get some number of years. If that's the way you felt and you felt, on the basis of the evidence, that someone ought to die and all the other jurors agreed agreed, you wrote in death or life or some number of years, okay?

Now, that changed about some fifteen years ago—maybe not that long ago. Instead, you don't make that decision directly. You make the decision indirectly on the basis of the answers to three questions that you're called upon to answer and, you see, the law requires the Judge to take an automatic and mandatory course of action. Am I making myself clear?

A Yes.

[293] Q I think the Judge explained this rather adequately the other day, but I just want to go over it again. You understand that it boils down to this: Just as we had the burden of proof in the first part of the trial to convince you that the Defendant is guilty and, if we proved that, you unanimously found the Defendant guilty, the same thing holds true for the second part. We have the burden of convincing you, since we're seeking the death penalty, that those questions should be answered yes. If we do, your oath as a juror will require you to answer the questions yes which you know, three yes answers or all yes answers, means an automatic sentence of death. Judge McDowell has no power under the law to override or change your verdict. You write a letter to him, basically. Three yes answers is automatic death. He can't say, "Well, I disagree with you. I'm going to give him a life sentence."

The same thing would hold true if you answer one or more of the questions no, an automatic life sentence. Whether the Judge agrees or disagrees, it doesn't matter. He [294] will follow that particular order that you give him based on those answers. Okay? Any problem with that procedure?

A No.

Q Okay. Now, let's look at the questions very briefly. Take whatever time you need, Mr. Bozeman, to look over those questions and we'll talk about them in just a minute.

A (Juror complies.)

Q Did you get a chance to read all three of them?

A Yes.

Q Did they cause you any problems at all or do you have any questions about any of the three questions?

A No.

Q Do you understand, as I said earlier, that we have to prove those to you. We have to bring you evidence or there has to be evidence presented during the trial that would convince you that those questions should be answered yes beyond a reasonable doubt?

A Right.

Q Is there any reason why you couldn't—allowing that I cannot go into the [295] evidence of this particular case. We're just talking in generalities, sir. Is there any reason why you couldn't answer that first question yes or no depending upon the type of evidence you received, you know, whether someone acted deliberately with the reasonable expectation that the death of somebody would result? Any reason why you couldn't answer that question yes or no?

A No, there's not.

Q Can you see that the type of evidence you would probably need to receive to answer that question would be given to you in the first part of the trial when you learn about how the offense was actually committed and what role the Defendant had?

A Yes.

Q Okay. Question number two, does that cause any problems at all? That kind of looks toward future behavior, doesn't it—

A Yes.

Q All right.—you know, is there a probability that he would commit some criminal acts of violence that would constitute a continuing threat to society. Do you think [296] that question can be answered? Well, let—

A Yes.

Q —me put it this way: You know it can—you think it can?

A Yes.

Q What sort of evidence do you feel would be valuable to you? If you could just tell us, what do you think you would want to know about somebody that would aid you to answer that question yes? What would be the most valuable to you?

A I would probably want to know what he's done in the past and the degree of violence that was involved in those acts.

Q Do you think that would aid you?

A Yes.

Q Do you think, of course—and it's probably reasonable that what you learn about what he did during the actual commission of the crime, actually before the crime in preparation for it, during the crime itself, and then maybe how he reacted afterwards?

A Yes.

Q Do you think that's a pretty good barometer sometimes, how a person reacts after [297] a crime, either remorseful and contrite or are they just kind of nonchalant about it and couldn't care less?

A Yes.

Q Do you think that kind of gives you some insight into what type of person you're dealing with and what—you mention this thing earlier about rehabilitation. You will notice that there is nothing in any of these questions about rehabilitation?

A No, there's not.

Q All right. Do you understand that you're bound, just like we're bound, by these three questions? Do you feel that

your personal feelings about rehabilitation would interfere in any way with the answers to those questions or do you feel number two maybe looks towards rehabilitation, although it doesn't use that word rehabilitation or rehabilitate?

A I guess it's like you were saying. It would depend on the demeanor of the person, you know, that actually committed the crime, whether he would actually—or there was a chance for him to be rehabilitated or not.

Q All right. You said earlier, if [298] you thought there was a chance that someone could be rehabilitated, you didn't think they should receive the death penalty?

A Right.

Q Let me just ask you—and I don't mean to play word games with you because a lot of times it sounds like that's what we're doing, especially these questions. You see, the Judge can't further define these questions for you. He can't give you any guidelines and neither can I, for that matter.

A Right.

Q He certainly would be in a better position, but he can't. The law does not permit him to do that and the lawyers can't, either.

A Okay.

Q But do you feel your feelings about rehabilitation would in any way conflict with your answering that question, number two?

A No, I don't think they would.

Q Now, number three is a question that may or may not be given to you it depends on whether or not some evidence is raised by any kind of provocation. Can you see [299] how that question could be answered yes or no depending on the type of evidence you receive?

A Yes.

Q Let's shift gears for just a second and let me back up on one thing. Do you remember what I said, years ago in a capital case, the jury was actually expected to express their own opinion as to whether or not somebody should live or

die. You know, if you had a particular feeling, as you sat over here and listened to the evidence, he let you voice that, "I think that guy ought to die." or "I think or "I think he ought to get life." or "I think he can be rehabilitated.", whatever the case may be. Do you understand that you can't do that now?

A Yes.

Q The law expects that these three questions be inserted between you and the Defendant in a death sentence or a life sentence, that you put aside your personal feelings and be rather—I hate to use the word. It may be inappropriate, but—pretty scientific, I guess, just look and see if the proof is there, if it measures up, [300] measures up to an answer beyond a reasonable doubt. If it does, answer the question yes. If it doesn't, you answer the question no, regardless of your personal feelings. Can you see—I'm not saying that this would ever occur, Mr. Bozeman, but can you see how you might be on a jury and you might have a personal desire after you heard the evidence, personal desire that the person would die or a personal desire that the person should receive a life sentence? But yet, you see, when it comes time to answer the questions, let's say if you're intellectually honest with regard to answering the questions—let's say you're on a jury and you say, "Well, I think the guy ought to die after I've heard this. This is horrible. I think the guy ought to die. It scares me, the thought of him being out on the streets again." But then you look at question one or two or three and actually, in all honestly, you say, "Well, as much as I want it done, the proof is just not there in all honesty. I'll have to answer one of those questions no." Could you go ahead and do that knowing it would result in a life sentence and [301] not a death sentence?

A Yes, I could.

Q Let's flip that over. How about in a situation where you're on a jury and you say, "Well, this is a capital murder technically, but I don't think this is the type of capital murder that someone ought to die for." Yet, on the other hand, when

all the evidence is in, you see that those three questions, beyond any reasonable doubt, should be answered yes, knowing full well that will result in the execution of somebody who you personally don't desire to be executed—do you see what I'm getting at?

A Yes.

Q Could you go ahead and do that, in all honesty?

A I don't know. I would like to think I could, but I don't think I could. If I didn't feel like he deserved it, I don't think I could go for the death penalty.

Q Okay. We need to pause here for just a second because, obviously, you can see how crucial and critical that is to all of us here. I said, I'm not going to yell at you or [302] quarrel with you or try and talk you into or out of anything. I want to make sure you understand that. I think you're being honest with us and I know you've given it some thought. I just want to be sure. As I said earlier, we're going to have to pin you down on your position. And bearing in mind that I believe you have given it some thought since you were down here on Monday—you have, haven't you?

A Yes.

Q All right. I believe you just told us, that if you were in a situation where you had a personal feeling that a person -- you know, we know you're not a robot. We know that, when you sit over here, you're a human being and you're prone to having personal opinions about certain evidence or the desire of a particular situation. Are you saying, that if you, in all honesty, were on a jury, on a hypothetical jury, and you, in your heart, felt that person should not die, yet when you went to answer these three questions, even though, let's say, intellectually there was proof to satisfy you, number one, beyond any [303] reasonable doubt, he acted deliberately and with the reasonable expectation that someone would die, you would have to answer that question yes, and as far as number two, as much as you didn't want to answer that one yes, you would say, "Yeah, I want to be honest about it. I think there's

a probability he probably would commit some criminal acts of violence, in which case the law would expect you to answer the question yes, and let's say, in number three, there's no provocation, the poor victim, he didn't do anything to provoke anybody, I'd have to answer that one* yes, yet when it comes down to looking at those three questions and knowing that yes, yes, yes, is the same as writing death, you understand that the net effect is the same and that's contrary, completely contrary to what you desire, in honestly, Mr. Bozeman, if you're kind of gut-wrenching about it now, as we sit here now, knowing what kind of pressure would be on you—

MR. CUNNINGHAM: Your Honor, we'll object to that last statement. There's no indication and there's no evidence and it's [304] outside the record and it's speculating on whether or not that would be any pressure.

THE COURT: I'll overrule. I'll let Mr. Bozeman make up his mind on that. I think he's answered all the questions I've heard so far very thoughtfully and intelligently, Mr. Bozeman. if any question posed by a lawyer doesn't seem understandable to you, don't hesitate to say so. I'll overrule the objection, Mr. Cunningham.

Q Do you see what I'm getting at? You're not under the same kind of pressure, reasonab11, that anyone would understand would be on the situation when you're making a life or death decision back in the jury room with eleven other people. Do you really feel you could put aside your personal feelings or, as you said earlier—you said you didn't think you could?

MR. CUNNINGHAM: Your Honor, we'll object to that last [305] statement. He's gone through those three questions and he said he could answer yes if the facts and circumstances proved beyond a reasonable doubt that the answer should be yes. He said that several different ways.

THE COURT: I'll overrule, Mr. Cunningham. I'll let him answer the questions. You might want to reask it, Mr. Macaluso, to make sure it's clear to Mr. Bozeman. I think he said a moment ago that he might have some problems with it because he would be hesitant about someone receiving the death penalty.

MR. CUNNINGHAM: Your Honor, I would hope that every juror.. that was sent over there will have some problems with it. The issue is, if he hears the proper facts and circumstances beyond a reasonable doubt, that the answer should be yes to number one that he would [306] do that. The same thing for number two and the same thing for number th e.

THE COURT: I agree. With that statement of law, I'll let Mr. Macaluso reask the question, if he wants to, in case Mr. Bozeman needs to be refreshed.

Q I can barely remember the question. I think it came down to, you said that, if you felt one way, but the proof was another way—

A I'd have to vote with the proof, you know, no matter how I felt. If the answer was yes, then I would have to put yes no matter how I felt about it.

Q Let me shift gears here away from, what we call—we've talked about capital murder and mandatory life or death—and talk about a situation that I'm not saying would necessarily occur in this case or any other case, for that matter, Mr. Bozeman, but we need to discuss it now because we have the opportunity.

Imagine for a second that you're [307] on a capital murder jury and let's say it's a capital murder that is allegedly a m during a burglary, let's say, because it's a type of capital murder, or it could be during a rape, I guess. Let's say that you heard all the evidence in the first part of the trial and you and the other jurors were convinced beyond any reasonable

doubt that a murder occurred. There's no doubt about it, but you didn't hear any evidence about a burglary or you have a reasonable doubt. You're just not sure about whether that burglary—it was actually murder during a burglary. Do you understand, if that were to occur, you couldn't convict someone of capital murder because the State in that case didn't prove a capital murder to you, did they?

A Right.

Q All they proved was what?

A Was the murder.

Q You got it. In such a situation you find the Defendant not guilty of capital murder simply because it wasn't proven to you, both parts were not proven to you. You find him guilty of what was proven to you and that's murder, as you've already said. Were that to [308] occur—imagine for a second that you're in a hypothetical situation now where that happened. The range of penalty for murder is altogether different. It's no longer mandatory life or death. Instead, it's the broadest range of punishment provided for under our penal code and our penal system.

Let me just ask you—let me talk a little bit about what murder is. I said earlier that murder is a situation where one person knowingly or intentionally causes the death of another individual. Okay. Let me go on to explain, so we're clear on this and you're clear on this, that that is a situation where this homicide occurs, this killing occurs, without any legal excuse or any legal justification whatsoever. All right? By that I mean, we're not talking about a situation where you believe someone acted in self-defense, whether it's, if I kill Mr. Nelson or you kill me because you think you're in fear of serious bodily injury reasonably or death—and the law gives you the right to kill me. You could be charged with murder, but it wouldn't be murder if the jury believed that [309] you acted in self-defense or I did. Do you see?

A Right.

Q Forget about self-defense when you talk about murder. The same thing would hold true for, if you believed it was an accident. Now, I could kill Mr. Nelson or you could kill somebody. It was an accidental thing. You could be charged with murder, but if the jury believed it was an accident, it's not murder. A person has to be found not guilty just as he would be if you believed he was acting in self-defense.

The same thing would hold true if you thought someone was insane. As much as people have reservations about the insanity defense, if you honestly believe or have a reasonable doubt that somebody was insane at the time of a homicide, you can't convict him of murder.

Lastly, don't be thinking about a situation where someone acts in the heat of sudden passion. As an example, somebody comes home and finds out, God forbid, that their child was sexually abused or something like [310] that happened, something bad, and he picks up a gun and goes into a rage and goes down the street and kills somebody. Do you see what I'm getting at?

A Yes.

Q That's a homicide, but that's a lower grade of homicide. That's not murder, if you believe that, if you're on a jury. Let's divorce our thinking from those sorts of things and let's talk about a situation where one person knowingly or intentionally causes the death of another. I can't give you any other examples. Let me ask you—I gather from what you said, of course, and it's reasonable that anybody would feel this way, that you think murder is a very serious grade of offense.

A Right.

Q Let me ask you: What do you personally feel ought to be the minimum punishment for somebody committing a murder, sir?

MR. CUNNINGHAM: Your Honor, we will object to the form of the question in asking this prospective juror what the minimum [311] punishment is without telling him what the state legislature has set as the minimum punishment, that being five years to ninety-nine or life.

MR. MACALUSO: I intend to do that, Judge. I'm just asking the jury what he—

THE COURT: Well, go ahead. I'll overrule the objection. I understand.

Q What do you personally feel ought to be the minimum when somebody commits a murder and it's not self-defense and not an accident and not insanity and not in the heat of sudden passion?

MR. CUNNINGHAM: Your Honor, we would still object to the form of the question. It's an improper question, the way he has asked the juror.

THE COURT: I'll overrule, Mr. Cunningham, in this particular situation. I'll overrule and say no more.

[312] A I would say twenty years, I guess.

Q You understand that in a murder case you would be allowed to consider all the facts and circumstances surrounding it, but I want you to understand that you still exclude those four different categories we talked about. Am I making myself clear?

A Yes.

Q Now, Mr. Cunningham is right that the range of penalty is, as I said earlier, very, very broad to encompass a wide variety of situations. As I said earlier, we want to know how Mr. Bozeman feels.

The range of penalty for the offense of murder is, under the law, as low as five years and all the way up to ninety-nine years or life. The law does allow the jury to consider all of the facts and circumstances surrounding the situation where a

person murders another person. It boils down to this, Mr. Bozeman, I just want to know what Mr. Bozeman's feelings are and you said that twenty years ought to be the minimum; is that correct?

A Yes.

Q Mr. Bozeman, let me ask you—I [313] can't give you a fact situation, sir, "Well, Mr. Bozeman, what would you do h would you do here?" "What if this happened, what would you do here?" That's not proper for us to do that, either side to do that. Are you saying, sir, that you would ever feel, knowing yourself, it would ever be proper under any facts and circumstances where one -person murders another person, absent of those other circumstances, to ever give a sentence as low as five years? Do you feel it would ever be proper under any circumstances?

A No, not if it was murder.

Q As I said earlier, Mr. Bozeman, it's not my position, my responsibility, or my desire to talk you into or out of a position and I think it holds true certainly for Mr. Cunningham and Mr. West when they talk to you. As I said from the very outside, we want to know how Mr. Bozeman feels. Let me just make sure we're clear on this. Are you saying that you—and we know you haven't heard any facts surrounding any hypothetical murder and we can't give you any, but are you telling us, telling the Court, telling the Judge, that you [314] do not feel it would ever be proper under any facts and circumstances, whether you can imagine them or not, to ever give as low as five years for a situation where one person knowingly or intentionally causes the death of another, no legal excuse, no legal justification whatsoever, no insanity, no heat of sudden passion, no self-defense, no accident, you're saying you could never do that?

A Yes, I could, but, like I say, it would depend on the circumstances. Say, the person who was doing the commission of the act, say he panicked and he was trying to, you know, flee the scene and something happened that caused the

death, you know, that really it was indirectly. It was his fault, but ht didn't do it with malice, then I could say, yes, probably five years could be in order.

Q Bear in mind that we're talking about a knowing or intentional act.

A Oh, no, I don't think so. No.

Q Okay. Well, you see, you said, "I don't think so." Are you saying you could or you could not, sir?

[315] A (No response.)

Q For the knowing or intentional killing of another human being?

MR. CUNNINGHAM: And he believed from the facts and circumstances of that case, that that was a proper verdict, Your Honor.

A Yes.

Q Yes, you could or you could not?

A I could.

Q You could?

A Yes.

Q For a knowing or intentional—

MR. WEST: Your Honor, this is being repetitious. We've gone over it two or three times. He's already answered the question that He could, under the proper facts and circumstances as he deemed them to be, he could give a five year sentence. This is getting to be redundant at this point.

MR. MACALUSO: Judge, I don't mean to be repetitious. I [316] did not quite understand the last response and I just want to clarify it.

MR. WEST: Judge, we can have it read back.

THE COURT: I asked him and you can ask him one more time, Mr. Macaluso.

Q Just so we're clear, are you saying you can, sir, or you cannot?

A Yes, I can.

Q Okay. I am about out of time, Mr. Bozeman, but let me simply ask you: Do you have any questions of us at all at this time?

A No. No, I don't.

Q Sir, do you know of any reason whatsoever, whether I touched on it or not, why you f eel you could not be a fair and impartial, juror in this type of case?

A No.

Q Any reason that you know of, sir, why you could not sit in judgment of a fellow human being?

A No.

Q Okay. Anything that the Judge [317] covered with you the other day that you have any questions about, in any procedure that is involved in the trial of a case such as this?

A No.

Q Any problems at work or anything like that, family schedule?

A No.

Q You're a happy single man, aren't you?

A Yes.

Q You've been very polite and very kind and open and honest with us, Mr. Bozeman, and I appreciate it. That's all the questions I have for you, sir. I know that Mr. Cunningham and Mr. West will have some questions for you at this time. Thank you, very much, sir.

MR. MACALUSO: I'll pass at this time, Your Honor.

THE COURT: Thank you, Mr. Macaluso.

[318] EXAMINATION

BY MR. CUNNINGHAM:

Q Mr. Bozeman, as the Judge and Mr. Macaluso indicated to you, my name is Brice Cunningham and, along with Mr. West to my immediate left, we represent Mr. Miller-El in this case. I'd like to ask you just a few questions concerning your questionnaire.

How long have you been at the University of Texas at Dallas?

A I've been there about six months.

Q Where were you employed before that?

A Cam Audio.

Q How long were you with Cam Audio?

A I was with them a year.

Q Are you still attending college?

A No, I'm out right now.

Q That is at Denton, the University of Texas—no, North Texas State University?

A Right.

Q Mr. Bozeman, you indicated that you read the Dallas Times Herald; is that correct?

A Yes.

[319] Q Every day?

A Yes.

Q Have you read anything that may purport to be what the facts are in this particular case in the Dallas Times Herald?

A No, I haven't,

Q If you did, you would know that you would have to put that out of your mind, if chosen as a juror on this case, and disregard that because that is some hearsay that reporters are putting in the paper. All the evidence will come from where you're seated there now and in the physical evidence?

A Yes.

Q You could do that if chosen as a juror, sir?

A Yes.

Q The same thing would apply to radio or TV?

A Right.

Q You answered yes to a question that, either you, your spouse or any member of your family or a close friend ever studied law. Who was that, sir?

A I have a cousin in Los Angeles who [320] works for the DA's office.

Q Do you communicate with your cousin in Los Angeles?

A No. I haven't for a few years.

Q Does he try criminal cases or civil cases or do you know?

A I think she's a criminal—

Q Oh, it's a she. Sorry. What is her name?

A Joleen Harkess.

Q When is the last time you saw her?

A Oh, it's been about six or seven years at a family reunion in Longview.

Q And the person that studied sociology is that you?

A Yes.

Q You also answered that you were interested in the outcome of a criminal case in Dallas County. You said yes, talking about T. Cullen Davis. That was just a passing interest as most people were at the time; is that true, sir?

A Yes.

Q And whatever you may have read or heard, either on the TV or the radio or in the [321] papers, you could put that out of your mind and, if you're chosen as a juror on this case, base your decisions totally about the facts and, evidence that you hear?

A Yes.

MR. CUNNINGHAM: Pass the juror.

THE COURT: Mr. Bozeman, let me ask you, if you would, sir, to go either in the jury room or the hall. Why don't you wait out in the hallway while we take up a law matter and we'll get you back in just as quickly as we can, one way or the other.

(Whereupon, Mr. Bozeman, left the courtroom, after which the following proceedings were held.)

THE COURT: I thought it might be better to remove the juror in case there's any discussion about what the State did

and what the defense did. Mr. Macaluso, the juror has been [322] qualified.

MR. MACALUSO: Yes, sir. We'll exercise a preemptory challenge at this time, Your Honor.

MR. CUNNINGHAM: I want to ask him one other question, Your Honor.

THE COURT: Ask Mr. Bozeman?

MR. CUNNINGHAM: Yes, or the Court can. I just want to put it in the record his race.

THE COURT: The Court will take note of the fact that he is a black male and according to the juror's sheet, he's twenty-eight years old.

In view of that, Mr. Macaluso, is the State exercising this preemptory for racial reasons or some other reason?

MR. MACALUSO: May the record also reflect that this is the first black that has been questioned by the State and the [323] defense.

THE COURT: Mr. Macaluso, I don't think the law requires the State to state its reason, but I think it is appropriate to ask you if it is for reasons other than his race.

MR. MACALUSO: No. I would state without hesitation or reservation that it is not, Your Honor. Although not required to, I would state at this time that I have reservations and I'm exercising a preemptory challenge in this particular situation because of the general answers of the venireman, Mr. Bow man, and specifically with regard to his feelings on the death penalty, his feelings and his position with regard to rehabilitative aspects of an individual charged with this sort of crime, his obvious hesitation, which is on the record, with regard to being able [324] to override bis personal feelings with regard to somebody receiving a life sentence, and that he

also said earlier that he felt the prior pattern of conduct would not necessarily be enough to convince him that a person was worthy or entitled to a death sentence, and other matters.

THE COURT: Let's bring Mr. Bozeman back in, please.

(Whereupon, Mr. Bozeman was returned to the courtroom and the following proceedings were held.)

THE COURT: Mr. Bozeman, come on back in, please, sir, if you would. Mr. Bozeman, you have been excused from service in this case, but I want to thank you and the lawyers want me to thank you for your attendance and your patience in answering these questions. You've very conscientiously answered the [325] questions and I hope you have good luck in your college career. I hope you get to finish college. It looks like you're working at it. Good luck to you.

(Whereupon, Mr. Bozeman left the courtroom, after which the following proceedings were held.)

MR. NELSON: Judge, during the last voir dire by Mr. Macaluso, Mr. West made an objection with reference to things being redundant or repetitious during voir dire. The Court has placed a time limit on us and it is our feeling, that as long as we work within that time limit, we can ask things as many times as we want to ask them. I don't think it is a proper objection and we would ask that the defense be instructed not to make that objection again in the presence of a juror.

* * * *

[332] MARY I. SUMROW, called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. NELSON:

Q Good morning, Ms. Sumrow. As I was introduced to you on Monday, my name is Jim Nelson. I'm an assistant district attorney in Dallas and I want to reintroduce everybody here. Right next to me is Mr. Paul Macaluso. I think you will remember Monday that another gentleman was sitting with us at about that corner of the counsel table by the name of Norman Rinne. The three of us are assistant criminal district attorneys in Dallas and we've been assigned by Mr. Henry Wade, our elected district attorney, to handle this case for him in this court and that's what we're going to be doing. Seated to my left, immediately to my left, is Mr. E. Brice Cunningham.

MR. CUNNINGHAM: Good morning.

Q Next to him is Mr. Royce West.

* * * *

[354] irate about what had happened or whatever that would take—if you felt that the person should get death, yet we failed to prove that the answer to question number one was yes, could you answer that question no?

A Yes, I could.

Q Even knowing that would result in a life sentence rather than a death sentence that you wanted emotionally, you feel you could intellectually set that aside and answer that question no because that was what the evidence showed?

A Yes, I could.

Q Okay. There's no question about that in your mind?

A No, none at all.

Q That's we're asking you to do, Ms. Sumrow, is base your verdict on the evidence and not your emotions.

A Right.

Q Now, there is always a chance in a case like this, although we don't expect it to happen, that: all will be proved will be the offense of murder. Let me give you a hypothetical example. Let's say we've got a [355] murder committed in the course of a burglary case. Let's say we prove to you that the Defendant in that case knowingly or intentionally caused the death of another individual, but we don't prove anything about a burglary, nothing about a burglary at all, then it's your duty, is it not, to find the Defendant guilty of the offense of murder?

A Yes, it is.

Q Okay. Knowing or intentionally causing the death of another individual. As I said, the death penalty is not an option in that case. The punishment range is anywhere from five years up to ninety-nine years or life and an optional fine of up to $10,000.00. Now, would you agree with me that there are—and I can't go into examples, but there are several or a multitude of circumstances under which one person could knowingly or intentionally cause the death of another individual. A multitude is about the best word I can think of of situations in which that could happen. Again, we aren't talking about self-defense and vie aren't talking about accident or something like that, but still a multitude of circumstances. [356] That's why murder has the widest range of punishment than any Texas law allows, anywhere from five years up to ninety-nine years or life.

Now, in order for you to be able to be qualified to serve as a juror, you have to tell us that you would be able to consider that entire range of punishment for murder. You don't have to tell us right now what you would assess because obviously you haven't heard the facts. You don't know what the facts are. What you have to be able to tell us is, that if, after you've heard all of the evidence you're going to hear, you feel that the facts and circumstances justify and call for a sentence of ninety-nine years, you would give it. At the other end, you have to be able to tell us that, if you feel that the facts and

circumstances, as you find them to be, justify a sentence of five years, you can give that or twenty years or forty-five years, anything in between. As you're sitting there right now, Ms. Sumrow, you don't even have to be able to verbalize to us the facts and circumstances that would justify five years or that would [357] justify life or something in between. You do have to be able to tell us that, if the facts and circumstances justified that in your mind, whatever that may take, you would assess a five year sentence if you felt it was justified or a ninety-nine or life sentence if you felt that was justified. Now, can you do that for the offense of murder?

A Yes, I could.

Q As I've said over and over again, what we're going to ask you to do is base your verdict on the evidence as you hear it and keep an open mind until you've heard all of the evidence, everything you're going to hear, before you make the decision because we want you to base your decision, base your verdict, on that evidence. I believe you're telling us you can do that; is that right?

A Yes.

Q Okay. If that evidence justifies five years or calls for five years, you will give five years; is that right?

A That is correct.

Q If the evidence calls for sixty years, you will give sixty. If it calls for [358] twelve years, you will give twelve. Whatever it is in that range, you can consider the entire range based on the law and the evidence; is that right?

A I believe that's correct.

Q Okay. Now, the law allows the Defendant to either testify or not to testify. It's his option. If he wants to testify, no one can stop him. If he doesn't want to testify, no one can make him testify. If he does not testify, you can't consider that. You can't talk about it in your deliberations and it can't come across your mind at all that he didn't testify or why he

didn't testify because he has an absolute right under the Fifty Amendment of the constitution to not testify. Do yo.u have any problem .with that?

A No, I don't.

Q If he does testify, you could judge him as you would any other witness; is that right?

A That's correct.

Q All the witnesses, basically, Ms. Sumrow, start out at the same point. It's kind of like race. Everybody starts out at the

* * * *

[392] A I do not see how it would, no.

Q Are you sure about that?

A I feel sure about it.

Q No vacation plans?

A No, sir, not until the summer.

MR. WEST: Nothing further, Your Honor.

THE COURT: Thank you, Mr. West, Mr. Nelson, Mr. Macaluso.

MR. NELSON: Your Honor, we would be very pleased to have Ms. Sumrow serve as a juror on this case.

MR. WEST: Your Honor, I guess-I'll have to concur with Mr. Nelson and we would be very pleased to have Ms. Sumrow on this case, also.

THE COURT: Ms. Sumrow,. Let me ask you—I'm going to give you an oath as a juror in this case. You have been accepted by both sides.

(Whereupon, the juror was duly sworn by the Court.)

[397] BILLY JEAN FIELDS, called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Good afternoon, Mr. Fields. Let me begin by reintroducing everyone here so you're acquainted with everyone here at the table. My name is Paul Macaluso and to my immediate left is Mr. Jim Nelson.

MR. NELSON: Hello.

Q Along with Mr. Norman Kinne, who is seated right over here to your far right, as he was introduced yesterday. We are three assistant criminal district attorneys here in Dallas, Mr. Fields. We work for the district attorney, Henry Wade. We've been designated as the lawyers to represent the State of Texas in this particular case.

Now, to Jim's immediate left is Mr. E. Brice Cunningham.

MR. CUNNINGHAM: How are you, Mr. Fields?

[398] Q And to Mr. Cunningham's immediate left is Mr. Royce West.

MR. WEST: Mr. Fields, how are you doing, sir?

Q Both Mr. West and Mr. Cunningham, you may recall, were introduced to you yesterday—not yesterday, Monday I guess it was. I lose track of time. They're the defense attorneys who have been appointed by judge McDowell to represent the accused Defendant. His name is Thomas Joe Miller-El. Let me ask you if you can see from where you are—you may have to lean forward a little bit. He's in the powder blue suit down there. Can you see him?

A Yes.

Q Th-e reason why I've reintrc di-ced you to everyone here is to let you hear our names once again and to reacquaint you with the roles that we all play in this case and then simply to ask you if you either know or have heard of

any one of us other than from the other day when we were introduced?

A Well, since I was here Monday, I heard about the case on the radio.

Q Okay. Could you tell us a little bit about it? What did you hear?

A Well, just a spot announcement that the case was fixing to be heard and it would probably take three weeks to seat the jurors.

Q What radio station was that, if you recall?

A KRLD.

Q Did they go into anything that was purported to be the facts or did they maintain the facts of the offense?

A It was just an announcement.

Q Did they give any information at all over the radio about where it happened or allegedly happened or who was involved? Let me ask you this, sir: Was there anything that you heard on the radio or anywhere else, if you've read anything, for that matter, or talked to anybody, that you feel would influence your decision in this case or keep you from being a fair and impartial juror?

A No.

Q Okay. You could put that aside, whatever you heard?

[400] A Correct.

Q Okay. And even if you couldn't, it wouldn't affect your deliberations; is that correct?

A No.

Q Okay. Mr. Fields, as you well know at this point, you are a prospective juror in this type of case. The law allows us to talk to you individually like we're doing now instead of talking to you in front of all the other people. I believe you've been on a civil case before; haven't you?

A Yes.

Q Did the lawyers talk to you individually during that jury selection?

A No.

Q Typically they will talk to you and you have to answer questions, but you have to do it in the presence of all the other jurors. We've got a little bit of privacy here today and that's the way it is in a death penalty case because we want you to be as relaxed and feel as free to express yourself as you possibly can without having a bunch of—you know, forty or fifty other strangers [401] critiqueing everything you have to say about some personal things. Let's take advantage of that, if we can. You look like you're pretty relaxed, anyway, but if you aren't. I'd invite you to be.

A I'm relaxed.

Q Sure. Remember that there are no right or wrong answers, sir. No one is going to quiz you about this. No one is grade you on your answers. We just want to know how you feel and, in some instances, how you feel about certain things. okay?

A Yes.

Q And if you're just honest with us and tell us how you honestly feel and, if we ask the right questions, then we'll be doing our job and so will you. No one is going to talk you into anything or talk you out of it or try to. I'll guarantee you that. No one is going to argue with you, quarrel with you, pick at you, criticize you or anything like that. We want to know just honestly how you feel, seat of the pants. If you have a question at any time, whether it is while I'm talking to you or the other lawyers are talking to you, by [402] all means ask the question or make the statement if it's something you need to tell us that we haven't covered, okay?

A Yes.

Q Now, let me tell you what the State's position is in this particular case. You know that the Defendant is charged with capital murder, the most serious level of offense under the laws of this state. You know that a person who is convicted of capital murder can receive only one of two

possible penalties. one is a sentence of death and the other is a sentence of life. There is no in between. It's one or the other.

Now, let me tell you what our position is, that is the position of the lawyers for the- State of Texas in this particular case. Mr. Fields, we are actively seeking the death penalty in this particular case for Thomas Joe Miller-E1. The only reason I tell you that is, is to be fair to you and put you on notice right from the very beginning as to what our posture is and what our position is. That is, we intend to be able to provide a jury, once it's selected—and we only have [403] one juror so far—with both the type and the quality of evidence so to convince them beyond any reasonable doubt whatsoever that Mr. Miller-E1 is guilty exactly as he is charged in this indictment and nothing less.

In the second part of the trial, in the penalty phase of the trial, once again, we intend to provide a jury—that would mean you, of course, if you are on it—with the type and the quality of evidence that would convince them beyond a reasonable doubt that the questions should be answered yes in each instance which, as you know, as the Judge told you the other day, would result in the Judge sentencing the Defendant t-o be executed. Am I making myself clear?

A Yes.

Q Now, that is our position. Our position really doesn't matter because, of course, ultimately it's the position of the jury and ultimately based on the evidence. I want you to know what we're seeking and we're going about it, okay?

A Yes.

Q Now, do you have any questions to [404] this point, sir?

A No.

Q Okay. Good. With those preliminary remarks out of the way, let me just ask you, Mr. Fields, although you did indicate here on question fifty-six with regard to do you

believe in the death penalty—they don't give you a whole lot of room and you don't have a lot of time to think about it or to respond, but would you just tell us, sir, in your own words, just how you feel about the death penalty and capital punishment and your ability to actually serve on a jury of this type and actually render a decision that could result in the death of the Defendant in this particular case?

A Well, I also indicated on there that I was active in a church and, according to t-he way I personally believe, which may not necessarily be according to my denominational stance, God's word, you know, provides for the State to serve in his behalf. According to the Old Testament, people were killed if they violated His law. In its extended service, the State represents Him if the crime has been [405] committed and death is warranted.

MR. CUNNINGHAM: I'm sorry. I didn't get the last part.

A I said I feel that the State is God's extended person. In other words, the State represents God in today's time. Therefore, if the State exacts death, then that's what it should be.

Q You said there was some conflict possibly between—you said what the church believes, what your religious beliefs are—

A Well, I said me personally. There are people who are Catholic, Baptist and whatever else, that don't believe in the death penalty. They don't think it's God's will that people should be executed. They think He's a very loving God and He's not one that punishes. I don't believe that way.

Q So you have no philosophical reservations about the death penalty or any religious reservations?

A No.

Q Mr. Fields, do you feel that it serves a particular purpose?

A Does it serve a particular [406] purpose?

Q Do you think the -death penalty or the imposition of the death penalty; do you think that serves a purpose?

A ' es.

Q How do you view that?

A Well, I think that, if an individual knows that there is the possibility of death awaiting him or her, maybe they will think twice before they decide to premeditate—

Q In other words, you feel—I'm sorry. I didn't mean to cut you off.

A I just said that they would think twice about what they're going to do.

Q In other words, you feel it may well be a ieterrent to other people, to deter them possibly from committing that type of offense?

A Yes.

Q Have you ever felt differently about the death penalty?

A No.

Q You're forty-six. Are you folks alive?

[407] A Yes.

Q Do you know or could you hazard a guess what their position would have been about the death penalty?

A No, I don't know.

Q You're married to Mrs. Fields. Would you know or could you hazard a guess about—

A She feels basically the same way I do.

Q All right. Let me ask you: What sort of offenses do you feel, personally—just picking your own brain and just searching your own soul, what sort of offenses do you feel the death penalty ought to be reserved for?

A Well, the taking of a life, basically—

Q Do you feel strongly about that?

A —but then—well, yes. Now, of course, there are other crimes that fall in the same category and that would be rape and the misuse of an individual by another for his own personal gain where this individual's basic freedoms were hampered.

[408] Q You said it should be reserved, in your opinion, for murder type offenses?

A Murder, rape and slavery, I suppose you could say it that way, if a person's civil rights are being forced out of play.

Q Anything else you can think of?

A Not particularly.

Q The law largely agrees with you in that respect with the exception of the last aspect that you mentioned. The death penalty in Texas, at least, is reserved for murder-type offenses. You mentioned rape. There is one aspect of that that comes into play, a murder offense is made a capital offense. I'll talk to you about that in just a minute. Under the laws of Texas, the only offense for which you can receive the death penalty for, even potentially, is for what we call, as you know, capital murder. First you have the offense of murder. That's just called murder. That's a first degree felony under the laws of this state.

A person commits murder if he knowingly or intentionally causes the death of [409] another human being. That's basically what it is, just murder, and you can't receive the death penalty for it. Am I making myself clear?

A Yes.

Q On the other hand, if you commit murder of a certain class of individual or murder under certain circumstances, the murder itself becomes raised or elevated to a level of capital murder. You can receive the death penalty for capital murder. Do you see what I'm getting at?

A Yes.

Q An example of that is, if you commit murder during a rape or murder during a robbery, murder while you're committing a burglary or arson or kidnapping—do you see—murder plus. Or obviously, as I'm sure you well know, if you murder a police officer or a fireman or a jail guard in the lawful discharge of their duties, then you can receive the potential punishment of the death penalty. If you kill—multiple murder, you know, a string of murders in one situation, or if you hire yourself out. There are other areas,

but [410] basically, it's either class of individual or murder during a particular situation. How does that square with your way of thinking of what a death penalty case ought to be, you know, given the individual facts and circumstances?

A Okay.

Q As I mentioned earlier in my initial question, do you have any reservations at all about your ability to actually sit on this type of a jury and render a decision, actually make the decision that could result in the execution of another human being?

A No.

Q Could you do that?

A Yes.

Q All right. Now, let's talk a little bit about the way that the determination is made. In other words, the Judge talked to you on Monday and told you basically how a criminal trial is conducted here in this state. The trial itself is conducted in two parts. Let me pause a second. Have you ever been down here on jury duty, other than on the civil case?

A No.

[411] Q Well, criminal trials, all criminal trials, whether it be for the lowest misdemeanor or for a capital offense, they're all conducted in two phases or, two distinct parts. We call them two separate trials. The first part deals only with the guilty or innocence of the person who is charged. That's all. The only determination the jury makes is, the person is guilty beyond a reasonable doubt. In other words, has the State proven that he is guilty, proved all that is in this indictment beyond a reasonable doubt, or have they failed to do so. Before you could actually serve on a jury, whether it be a capital case or otherwise, you take a sworn oath to a true verdict render according to the law and according to the evidence. It boils down to this, if the State proves that the man is guilty, we've proved all the elements of the offense to you beyond a reasonable doubt, your oath requires that you find the Defendant guilty. Just the same, if we fail to prove all

the elements in the indictment, then the jury will be required to find the Defendant not guilty. Any problem with that at all?
[412] A No.

Q If we prove it to you, you could be able to find a Defendant guilty, could you not?

A Yes.

Q If we didn't, you would find him not guilty?

A Right.

Q Okay. If you find him not guilty, the trial is over. If you find him guilty, then we go on to the second part of the trial where the actual punishment is now a consideration. Do you see how they compartmentalize that?

A Yes.

Q Okay. In the second part of the trial, you can hear additional evidence to aid you in making the decision you would be called upon to make. Then again, there is no requirement on either side to offer additional testimony. You see, either side can offer testimony, but neither side has to. Am I making myself clear?

A Right.

Q If you didn't hear any more [413] testimony in the second part of the trial, then you would be called upon to make a decision as to the punishment on the basis of all you learned in the first part of the trial. While the trial is in two parts, you see, in the second part of the trial, you can consider all the evidence you heard up to that point, even in the first part. Do you see what I'm getting at?

A Yes.

Q In other words, you're not limited to what you hear in each section. How, whether you hear additional testimony or not, at the end of the second phase of the trial, it used to be that juries made a decision direct in a capital case whether a person should live or die or receive a number of years. In other words, if you had a particular feeling about it and after you heard the evidence, you thought the person ought to die and the other eleven people agreed, that's how you voted and

that's what it was. If you thought it should have been life and everyone agreed with you, everyone on the jury unanimously agreed, then it's life or some number of years, but you made [414] the decision on a personal basis. You decided personally how the evidence affected you and what you wanted to vote for.

That changed about thirteen years ago and that particular prerogative has been taken away from the jury. Instead of holding the life or death or a number of years on the basis of your personal feelings, instead you're called upon to answer these three questions. It's on the basis of the answers to the three questions that the law requires the Judge automatically to assess a penalty of death or a sentence of life. Am I making myself clear?

A Yes.

Q Now, you know as well as I do at this point that all the answers that are submitted, you -can receive no more than three—and I'm going to let you look at them in just a second. If all the questions are answered yes, then the law requires and would require—and there's no doubt in mind that Judge McDowell would follow his oath, as a Judge of the courts—the Judge to sentence the Defendant to be executed. He can't override your verdict. He may not necessarily [415] agree with your verdict, but you wouldn't know that. He cannot say, "Well, you answered these questions yes, but I think he should get a life sentence." or "I'm going to give him a life sentence instead of the death sentence." He can't do that. If you answer all three questions yes, the Judge will sentence the Defendant to be executed. It's just the same, if you answer on or more of the questions no, you see, whether he agrees with you or disagrees with you, it doesn't matter. He will assess a sentence of life. Am I making myself clear?

A Yes.

Q All right. Now, you know that the State has the burden of proof in both parts of the trial. We brought the indictment.

We've done the accusing and we must also do the proving. The same thing holds true for the second part of the trial. We're seeking the death penalty. We must provide you and the other jurors with the type and quality of evidence that convinces you that the questions should be answered yes. If we do, then you answer the questions yes. If we don't, you [416] answer the questions no. Any problem with that at all?

A No, sir.

Q Okay. Let's take a look over here on the left. There's a number one, a number two and a number three. Take your time and read those, sir, if you would, please, and we'll talk about them in just a second.

A (Juror complies.)

Q Have you had a chance to look at those?

A Yes.

Q Did they cause you any problem right off the bat, any confusion?

A No.

Q All right. You understand that you would only be called upon to answer these questions, Mr. Fields, assuming—let's just set a hypothetical example here. Let's say you're on a capital murder case and you've heard all of the evidence in the first part of the trial and you and the other jurors agree that the Defendant is guilty. Let's lust assume that imaginary case, okay? You've heard all the evidence in the second part of the [417] trial or you've concluded the second part of the trial, whether there was any additional evidence or not. You're back in the jury room and you're called upon to answer these questions. Now, the first question asks, was the conduct of the Defendant that caused the death of the deceased committed deliberately and with the reasonable expectation that the death of the deceased or another would result. What do you think you're being asked there, Mr. Fields?

A Oh,-it's asking—wanting to know if the person who committed the crime did it deliberately, with the premeditated intent to kill.

Q Okay. In other words, you look to the conduct of the individual. I think you can see that probably—you're seeing the information that you need to answer this question probably when you're learning about the offense itself, how it all happened, what role the Defendant played, and so forth and so on. You decide whether he acted deliberately, was whatever he did, whatever role he played, did he act deliberately. Some people say [418] intentional, but was it deliberate conduct. Did he intend to do it and did he act deliberately. Furthermore, was the act or whatever he did, shooting somebody, whatever it may not talking about this case, I'm just talking about hypothetical example—was reasonable expectation that someone was to die. Can you see how you can answer question yes or no depending on the facts of the case?

A Yes.

Q Let's go on to number two. What do you think is being asked there, is there a probability that the Defendant will commit criminal acts of violence that. would constitute a continuing threat to society?

A Well, this is asking, I think, would the person be classified as a professional criminal or was this just an isolated incident that resulted in the death.

Q What do you think would be the most valuable evidence that you could receive? In other words, if you could say to us, "Mr [419] Macaluso, this is what I consider the most important. I would like to know this about the individual or know that about the individual.", if you wanted to answer that question yes? What can you tell us in that regard? What do you think would be the most valuable thing for you, Mr. Fields, to know about somebody that would enable you to answer that question yes?

A Well, if the individual at the time the crime was committed—if there were individuals who saw what took place or whatever, some type of, you know—an individual or a film or whatever that indicated the person did the crime.

Q Let's just assume that you—understand that you've already found the individual guilty of the offense. Now, you're deciding whether or not there's a probability he would commit future acts of criminal violence. What sort of evidence do you think would aid you, what sort of testimony, what sort of facts, what sort of background, in deciding whether or not this is the type of individual that would probably do something of a criminal nature again?

[420] A Well, typically you would say a history of the person's past actions, but I would think also possibly hearing that individual himself talk to me.

Q Well, you understand—let me just back up a second. You understand that in a criminal trial, no matter what kind of criminal trial, be it capital murder or shoplifting, any person charged with a crime has a right not to testify?

A Yes.

Q Although I have no way of knowing, in any case, whether a Defendant will testify or not, let's assume that the Defendant does not for these purposes. Do you understand that, if the Defendant wants to testify, he can and, if he doesn't want to, no one can make him? Do you understand that, also?

A Yes.

Q If he chooses not to testify, that's fine. That's a right that we all have. You cannot consider that as any evidence of his guilty whatsoever. Do you understand that?

A Right.

Q You can't hold that against him in [421] either part of the trial?

A Right.

Q So it may well be, during the trial, that you may not hear from the Defendant, do you understand that, so wouldn't

have that information to assist you. Let me ask you this, Mr. Fields: Do you think you could learn enough about an individual when you learn about the crime itself for which he's on trial, when you learn the dynamics of the crime, the very spastics of the crime? In other words, what lead up to the crime, what planning was involved, what role did a Defendant had in that planning, if any, what alternatives he could have taken, did he have to commit this crime. I mean, was it necessary or, you know, any stretch of the imagination, doing the commission of the offense itself? Did he have to do this? Did he have to do that? How violent and vicious was it? What role did he play in it? was he subservient or was he active in calling the shots, so to speak? Do you see what I'm getting at?

A Yes.

[422] Q What alternatives did he have? What about afterwards, how did he react? Did he show remorse and contrition or was he nonchalant, was he blase, did he care, you know, was it another day at the office, was he the type of person that it was just like swatting a fly? Do you see what I'm getting at?

A Yes.

Q Do you think you could learn enough about an individual when you learn all of those facets of his involvement in a very serious capital murder to tell you to answer that question, yes, there's a probability he would commit some criminal acts of violence in the future? Do you think you could do that?

A Right.

Q I'm not trying to—I just want to know how you feel about it. Don't go along with me. If you don't think so, fine. Do you think you could?

A Yes.

Q You said, also, that you would like to know about his background?

A Right.

[423] Q All right. Other criminal acts and so forth?

A Yes.

Q Let me just ask you briefly: What does that word probability mean to you in that connotation?

A Well, it means is there a possibility that he will continue to lead this type of life, will he be rehabilitated or does he intend to make this a life-long ambition.

Q Let me ask you, Mr. Fields, do you feel as though some people simply cannot be rehabilitated?

A No.

Q You think everyone can be rehabilitated?

A Yes.

Q I'm just curious. How would you ever know that there is somebody that—well, you said something earlier, but I can't remember exactly what it was, about whether or not somebody could be rehabilitated in conjunction with one of my questions earlier. You said that would tell you whether or not somebody could possibly be rehabilitated?

[424] A Well, I think you're talking about the fact of whether or not it was premeditated. It may be far-fetched, but I feel like, if a person has the opportunity to really be talked about God and he commits himself, whereas he has committed this offense, then if he turns his life around, that is rehabilitation. I know the State has a program that is supposed to work, but also it has a relatively bad record. I feel like when an individual has really been truly reached by someone reading the word of God to him and they are repentant and they do have a real act of contrition, they can be rehabilitated and that's been demonstrated.

Q Let me ask you this, sir—and I don't mean to quarrel with you. I want you to understand that. These questions are very important to all of us and your impressions of these questions. As I said earlier, you're not saying anything right and you're not saying anything wrong. You're just being honest with us. You notice that there is nothing in these questions that directly verbatim addresses rehabilitation. The

word is not used there. [425] Of course, I can't tell you what these questions mean. Do you understand that? That's for you to decide. Let me ask you this hypothetically: Do you feel that if somebody, as you just said earlier, if the Defendant—and we're not talking about Mr. Miller-E1. We're just talking about an imaginary Defendant—were to get on the witness stand and indicate to you that he is repentant and has had this religious experience or conversion or exposure, at least, if you were to believe him, do you feel that you could ever answer these questions yes regardless of the evidence at that point? Could you ever allow this person to ever be executed?

A Yes.

Q I'm just curious. How would that square with your feelings about rehabilitation?

A Well, now based on what you said as far as the crime goes, there are only two things that could be rendered, death or life in prison. If for some reason the testimony didn't warrant death, then life imprisonment would give an individual an opportunity to rehabilitate. But, you know, you said that the [426] jurors didn't have the opportunity to make a personal decision in the matter with reference to what I thought or felt, but it was just based on the questions according to the way the law has been handed down.

Q Let's shift gears away from capital murder and let's talk about a situation that I'm not suggesting occurred in this particular case, but it something I have to approach with you at this point because we have the opportunity. Let's imagine again that you're on a jury, a capital murder case. Let's say it's a murder alleged to have been committed during a rape. That's a type of capital murder. Let's say you were convinced, along with the other jurors and you don't have any doubt whatsoever that the Defendant committed the murder, but let's say you don't hear any testimony about any rape or you have a reasonable doubt that it occurred during the commission of a rape, you understand that if we expect you to

convict somebody of capital murder, we have to prove both the murder and the rape. Am I making myself clear?

A Yes.

[427] Q We haven't done that, have we?

A No.

Q Not in that example. What you do in a situation like that, you have to, under your oath, find that Defendant not guilty of capital murder simply because we didn't prove capital murder. Do you see? What did we prove?

A You proved rape.

Q No, we didn't prove rape at all. We proved murder.

A Well, one or the other.

Q Right. There's no testimony on rape, but there is testimony on murder and you're convinced it was a murder, so you find him guilty of murder. It wouldn't be capital murder and if it's not capital murder, it's not mandatory life or death. Do you see what I'm getting at?

A Yes.

Q In that situation, you would be called upon to assess a penalty for the offense of murder, not capital murder, but just regular murder and you can't receive the death penalty for regular murder. Now, so we're clear on [428] this and I want to be brief about this, but I need to cover this with you. When we talk about murder, we're talking about a situation where one person knowingly or intentionally or both, knowingly and intentionally, causes the death of another individual without any legal excuse and without any legal justification at all. So when you talk about murder, I want to divorce from your mind, if we can, a homicide, you see, where you have somebody who was acting in self-defense. In other words, when you talk about the range of punishment for murder, we're not talking about a range of penalty for a situation where you believe someone killed somebody else, but they did it in self-defense because, if you believe that someone acted in self-defense—for example, if I felt that Mr. Nelson was going to kill me or you felt that way about me, you have

the right to protect yourself all the way to the point of using deadly force to kill me. See, you could be charged with murder or I could be charged with murder, but if the jury believed that I acted in self-defense, they would have to find me not guilty. Do you see what I'm getting at?

[429] A Yes.

Q It's not like you're giving a lower penalty. Huh-uh. You have to find the Defendant not guilty. Do you see what I'm getting at?

A Yes.

Q So when we're talking about murder, forget about someone that kills in self-defense. All right? The same thing holds true if you believe it was an accident. It may look like murder and somebody could be charged with murder, but if you believed honestly or had a reasonable doubt that it was an accident, the gun went off accidentally or something like that, you don't give them a low punishment. You find them not guilty. So don't be thinking about accidents, either, all right, or insanity. A lot of people are skeptical about insanity defenses these days for whatever reasons, but if you believed someone was insane at the time he killed somebody, you would have to find them not guilty, so don't be thinking about that. The same thing holds true if you believe it was a crime of passion. That's a situation—as an example, if someone comes [430] home and finds out that their child has been sexually molested by a neighbor and the neighbor is up the street laughing about it and you go into a rage basically, adequate cause, you take a gun and you kill the neighbor. The law doesn't excuse that, but it doesn't make it murder, either. If you were on a jury and you believed that the person killed with that kind of sudden passion, that sort of influence, you would not convict him of murder. You would convict him of voluntary manslaughter, so that's not murder. Do you see what I'm getting at?

A Yes.

Q The reason I'm making that point is, I want to make sure you understand as clear as I can present it what murder is. Now, the penalty range for murder is as broad as it is for any offense under the laws of this state. Okay. Let me ask you—I know you said earlier that you felt obviously strong about murder being, obviously, a very serious offense.

THE COURT: One moment, please. Is this a juror?

[431] MR. MACALUSO: Thank you, sir.

Q Mr. Fields, if you had the power, what do you think the minimum penalty ought to be for a murder as I've described it? In other words, I can't give you facts and situations like this type of murder or that type of murder, but excluding those things that we did discuss, excluding self-defense, excluding insanity, excluding accident, excluding any crime of passion or an emotional type thing.

A Are you saying that all of those you just named and described earlier—say types of violence that have a premeditated reason; is that what you're saying—

Q No.

A —and murder without a premeditated reason—

Q No. What I'm saying is, if one person knowingly or intentionally kills another and there is no legal excuse or justification. Those four things I gave you are legal excuses or justification. You see?

A Okay.

Q In other words, a person knowingly [432] or intentionally kills another person and it wasn't in self-defense because- that's not murder and it wasn't insanity and it wasn't an accident and it wasn't a crime of passion.

A Well, based on what I told you earlier, death would be the result.

Q All right. Now, that's your personal feeling; is that correct?

A Yes.

Q Now, let me explain, but it's not my position to argue with you or quarrel with you and I'm not going to do that. The range of penalty under the laws of Texas for the offense of murder is not less than five years nor more than ninety-nine years or life, depending upon the facts of a murder case, but still bear in mind excluding those four things that I described to you. I'm not talking about any of those. I gather from what you're saying—or just tell me in your own words, could you ever, would you ever, think, sir, that a five year sentence would ever be proper under any facts and circumstances for the offense of murder where one person knowingly or intentionally causes the death of another person, no self-[433] defense, no accident, no insanity, no crime of passion?

A Now, you asked me could I—you want to know what do I think the minimum penalty would be in a case of murder?

Q Right. What I actually want to know is, would you ever, knowing yourself, feel that five years would be enough, that the minimum punishment, five years—could you ever assess a penalty for five years in a murder case regardless of the facts or circumstances? As long as there is a murder, could you ever give as low as five years?

MR. CUNNINGHAM: And he felt that was the proper punishment based upon the law and the evidence that he had heard, Your Honor.

A Are you meaning personally or based on how the law sets this out?

Q Well, I guess a combination of both.

A Well, I was asking him, was he meaning how did I feel about it personally or how did I feel about it in regards to how the [434] law says it is.

Q Well, the law sets out—you see, we want to know how you feel.

A Well, it would be fine.

Q You say you could give five years?

A I'm saying I could give five years.

Q And if you felt it was proper, if the facts and circumstances called for ninety-nine years or life?

A I could give that.

Q Let me ask you this, sir: Do you know of any reason why you couldn't sit in judgment of another human being in a case of this type?

A No, sir.

Q The law says that a conviction can be had—that is, the jury can base a conviction on the testimony of one eyewitness to a crime. That's what the law says. You can understand how frequently there may be only one eyewitness to a crime, a lady is raped or someone has had their purse taken from them, whatever the case may be. There may be one survivor to whatever offense it is. The law [435] says that, whether it be capital murder or shoplifting or rape or purse snatching, if the jury believes that one eyewitness beyond a reasonable doubt—in other words, they believe that person can recognize the individual and testify to all the elements of the indictment, the jury can base a conviction on that and nothing else. How do you personally feel about it? Could you base a conviction in a capital murder where the death penalty is a potential on the testimony of one eyewitness if you believed the eyewitness beyond a reasonable doubt?

A Yes.

Q I'm just going through the questionnaire here. You said your brother—it says, "Have you, your spouse, or close friend or relative, ever been charged, arrested, indicted, or convicted of any criminal offense?" and you said something about your brother?

A Right.

Q Could you tell me a little bit about that?

A He was arrested and convicted on a [436] number of occasions for possession of a controlled substance.

Q Was that here in Dallas?

A Yes.

Q Was he involved in any trials or anything like that?

A I suppose of sorts. I don't really know too much about it.

Q Was he ever convicted?

A Yeah, he served time.

Q Do you feel that that would in any way interfere with your service on this jury at all?

A No.

Q Mr. Fields, you've been very polite and very kind and very open with us and I appreciate that. Let me just ask you, sir, whether I touched on it or not, is there any reason that you know of why you could not be fair and impartial to both sides?

A No.

Q Do you have any questions of me at all?

A No.

MR. MACALUSO: Thank you [437] very much. Your Honor, I'll pass the juror. Mr. Fields, Mr. Cunningham and Mr. West will have some questions for you.

THE COURT: Go ahead, Mr. Cunningham.

[438] EXAMINATION

BY MR. CUNNINGHAM:

Q Mr. Fields, as you have been advised, Mr. West and myself represent Thomas Joe Miller-El in this case where he is charged with the offense of capital murder. Very briefly I'd like to ask you some questions with reference to the questionnaire and possibly concerning some of the law.

First of all, what age man are you, sir?

A As of yesterday, I'm forty-seven.

Q Happy belated birthday. How long have you lived in Dallas County?

A About twenty-five years, twentyfour years. I came here in '62.

Q What is your race?

A I'm really colored.

Q Okay. Are you married, single or what is your marital status?

A I'm married and I have four children.

Q Does your wife work?

A No, she doesn't.

Q Where do you work?

[439] A I work for the U.S. Postal Service.

Q That's here in Dallas?

A Yes.

Q How long have you worked for the postal service?

A Eighteen years.

Q Do you have any children?

A Yes, four.

Q What do they do?

A They're all students from a senior in high school down to the third grade.

Q You attend St. Monica Catholic Church?

A Yes.

Q Is that an integrated church?

A Yes.

Q What racial mixture would you say it was? You know, how many—

A Oh, I would say the majority there are white or caucasian and then the next majority would be Latin American or Mexican American and then your people from the far east or middle east Indian, Vietnamese.

Q In other words—your church is [440] located where, in North Dallas?

A It's at the corner of Walnut Hill Lane and Midway Road.

Q How long have you been a member of St. Monica Catholic Church.

A For ten years.

Q Do you teach Sunday school or hold an office or anything?

A Well, in the Catholic church you don't have Sunday school as it's set up in the protestant church. I'm a member of the Holy Name Society and that's a men's organization and it's basically devised or set up to assist the pastor as he needs and to promote the belief of Christ.

Q How long have you been a member of the Holy Name Society.

A. For the last seven years. Now, in conjunction with that, as far as teaching goes, not within that parish, but at large within the Catholic church, there is what we call the charismatic renewal and I have taught there.

Q How long have you taught in the charismatic movement within the Catholic church?

[441] A Eleven years.

Q I notice that you attend this church more than once a week?

A Well, between the movement and the church, yes, and meetings, and we have only days of obligation which requires you to attend more than once a week.

Q You've indicated that you are a member or a financial supporter of a media church. What church is that, sir?

A St. Monica.

Q St. Monica?

A Oh, I'm sorry, the media church. Yes sir. The 700 Club on—which is—

Q How long have you been a contributor to the 700 Club?

A About five years.

Q You indicated that you have heard something on the radio, I believe—was it the radio?

A Yes.

Q You understand that that is not evidence in this case?

A Right.

Q And you could not consider that as [442] evidence?

A Right.

Q Would you do that, sir?

A Well, like I said, yes, I can do it, but it didn't go into any detail. It just said that this was coming up and it would probably take three weeks to seat jurors and that's where the thing ended.

Q You also understand that, if you heard something—if you were chosen as a member of this jury and you heard something on the radio or saw something on TV or read it in the papers, you could not consider that as any evidence whatsoever?

A Right.

Q How long have you had the bumper sticker on the back of your car?

A Eleven years.

Q And that bumper sticker says what?

A It says, "Jesus Renews the Hearts of Men"—or "Jesus Renews Hearts" in big letters and then "(the Hearts of Men)" in parentheses.

Q You indicated that you had received a ticket once and you felt that it [443] wasn't deserved?

A Right.

Q The fact that you received this ticket would not affect your decision if chosen as a juror in this case, sir?

A No.

Q You indicated that either a friend or—a member of your immediate family or a closer friend was a victim of a crime. Is that "mugging"?

A Yes.

Q Was it someone in your family?

A No, a friend.

Q Was anyone ever caught or anything?

A It just recently happened, so no one has been caught.

Q The fact that you have a friend that was mugged would not affect your decision, if you're chosen as a juror, in this case?

A No.

Q You would be fair to both sides?

A Yes.

Q Mr. Macaluso asked you about your brother. Whatever happened to your brother, [444] that would not affect your decision, if chosen as a juror, in this case, sir?

A No.

Q If you were chosen as a juror in this case, would you base your decisions only upon the evidence that you heard and the facts of that case, sir?

A Yes.

Q Let the chips fall where they may?

A Yes.

Q Do you know of any other reason why you could not be a fair and impartial juror, sir?

A No.

Q I'm going to add one word onto that. Do you know of any other reason why you could not be a -fair and impartial juror other .than your race, negro or color black?

A No.

MR. CUNNINGHAM: Pass the juror, Your Honor.

MR. NELSON: Judge, may we approach the bench?

THE COURT: Surely. Mr. Fields, let me ask you to go out [445] in the hallway while we have a law matter to take up here and, in that way, we can just do it without the lawyers having to come around.

(Whereupon, Mr. Fields left the courtroom, after which the following proceedings were held.)

MR. NELSON: We have an indication, Judge, that this juror has what they denominate as an annual leave coming up in the next couple of weeks and we thought that was a

situation that the Court ought to check into before a decision is made as to the qualification of this juror.

THE COURT: Well, I ca.n go into—go ahead, Mr. Cunningham.

MR. CUNNINGHAM: Your Honor, we would object. Mr. Macaluso talked with this prospective juror thirty minutes or more. I think one of his questions was whether [446] or not there was any reason why he' could not be a fair and impartial juror. I asked him the same thing. If he thought that his coming vacation would affect his sitting as a juror, the State could have inquired. If he had thought—and I would suggest from the answers we have received from Mr. Fields—it would affect his decision as a juror, he would have told us.

THE COURT: The only concern the Court has is, if he is accepted—I don't know what is going to happen, obviously. would need to ask him, frankly, before I swore him, if there was any reason why he couldn't come back and serve in a month, say. I have had that happen.

MR. MACALUSO: I might add, Your Honor, that I have had this occur a number of times and I think we all have. I'm not trying [447] to play word games here, but I did overlook asking that question and I. think the question, as Mr. Cunningham mentioned a moment ago, did address it, was there any reason why you couldn't be fair and impartial and not whether there is anything that would impede your service on this jury. I have had in the past and I know the Court is aware of situations that have occurred where we neglected to ask that question only to have it come up later on.

THE COURT: Well, Mr. Cunningham and Mr. West, how about the Court inquiring of him just in that area? I don't know where this information comes from.

MR. CUNNINGHAM: Your Honor, on behalf of the accused, Thomas Joe Miller-E1, Jr., I would object to even the State, the defense, or the Court inquiring of the juror whether or not the fact that he [448] has a vacation coming up in one week, two weeks—and it looks like it's getting even longer in this case—and would suggest that under Article 35.11 that all the State can do now is decide whether or not it wants to accept or reject this juror.

THE COURT: Mr. Nelson, Mr. Macaluso, I agree with the defense on that. I probably would still like to inquire if he is accepted.

MR. CUNNINGHAM: And then he would have to make other arrangements. It's just that simple.

THE COURT: That would be my position, unfortunately. I'm going to hold the juror qualified at this point, Mr. Macaluso and Mr. Nelson, and ask you-all to tell me whether you wish to accept or swear the juror?

MR. MACALUSO: We'll exercise—reluctantly exercise a [449] preemptory challenge, Your Honor. I want to ask the-Court, does the Court intend to make an inquiry?

THE COURT: Of him, or just in the future of all jurors?

MR. MACALUSO: Of him.

THE COURT: If you wish, I will, yes, just for information purposes.

MR. MACALUSO: I understand. I can envision a situation, because I've seen it before, where it comes back to haunt us somewhere down the line.

THE COURT: I had that happen in the last case you and I did and we spent about three hours on the juror and found out in the last five minutes that he had some—I think in the future what I will do, when I'm doing my little preamble there, is just tell the person—remind them again what the potential

schedule of this case is and ask them if [450] there is any reason they would be unable to do that. If they indicate there would be, I'll let the lawyers start pursuing it.

MR. WEST: Before we bring the juror back in, may the record reflect that is the second black that's been called by the Court for voir dire purposed.

THE COURT: The record may so reflect. I might add—go ahead, Mr. Nelson.

MR. NELSON: Your Honor, with reference to that, the State would like to offer into the record the fact that we're certainly not exercising a preemptory strike on Mr. Fields because of his race in this case, but we do have concern with reference to some of his statements as to the death penalty in that he said that he could only give death if he thought a person could not be rehabilitated and he

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[478] MARGARET M. GIBSON, called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Good afternoon, Ms. Gibson. Let me begin by reintroducing everyone here. My name is Paul Macaluso and-to my immediate left is Mr. Jim Nelson.

MR. NELSON: Good afternoon.

Q You may recall being introduced as well to Norman Kinne. He was seated over here. We are all assistant criminal district attorneys in Dallas and we're assistants to Henry Wade who,. I'm sure you know, is the district attorney for the next ten months or so. We've been designated to

represent the State of Texas in this particular case. To Jim's immediate left is Mr. E. Brice Cunningham.

MR. CUNNINGHAM: How are you doing, Ms. Gibson?

MR. GIBSON: Very well,

* * * *

[482] punishment. Do you see what I'm getting at?

A Uh-huh.

Q As I said earlier, all we want to know is exactly you feel or any juror feels with respect to the potential service on a case of this magnitude.

Now, let me tell you right off what our position is and that is the position of the State of Texas with regard to this particular case. Ma'am, we are actively seeking the death penalty in this case. The State of Texas here in Dallas County is actively seeking the death penalty for Thomas Joe Miller-E1. That is, we intend to be able to provide the jury, once it is selected, with the type and the quality of evidence that will convince them beyond any reasonable doubt, in the first phase of the trial, that the Defendant in this case is guilty exactly as he has been charged with capital murder.

Then in the second part of the trial, we intend to be able to provide a jury with both the type and the quality of evidence that would convince the jury beyond any reasonable doubt that those questions that will [483] be submitted to the jury in that phase of the trial should be answered yes. I'm sure you may recall from the remarks of the Judge, all yes answers, two or three, whatever the number of questions you get, all yes answers will require Judge McDowell by law mandatorially to sentence the Defendant in this case to be executed by lethal injection down in Huntsville, Texas. The reason I'm telling you that is not to—well, just to be fair with you basically, to tell you what our position is.

Ultimately, of course, our position really isn't what controls, you understand that, it's the findings of the jurors who ultimately will comprise this jury. I think it is only fair to let you know what our position is up front, that we are actively seeking, at the end of this trial basically, that this man be taken down to Huntsville, Texas and put to death. Like I said, it would be unfair of us not to let you know that, what our position is.

Now, you have been asked here about your position and your feelings about the death penalty. As I said, no one will quarrel [484] with you. No one is going to make anybody serve on a jury, for example, if they have a strong type of either religious, moral or personal convictions that would prevent them fro: participating in this type of a case. Let rye just tell you that right off. That's why we get to ask you these questions now, to clarify certain things, so that you ultimately can tell us—I'm saying tell us, you're really telling all of us. Even though you're looking at me now and I'm asking the questions, they're listening to everything you have to say as is Judge McDowell, as is the court reporter who is taking down everything for appeal purposes.

No one is going to try and put you in a position that is untenable, be it strong, religious or whatever feelings there may be that could prevent you from actually serving on this type of a jury. Now, let rye just ask you before we go any further. I know you've been asked this question on three lines here. Fifty-six was, do you believe in the death penalty. Let mE: just ask you, if you could in your own words, to share with us your personal feelings about the death penalty and capital [485] punishment and then, secondly, probably just as important, your ability or inability to actually on a jury of this type and render a decision or actually participate potentially in the execution of the Defendant?

A I don't believe in the death penalty. I don't know why it was started. I don't think it solves anything. It's the

ultimate punishment and it's part of the law and, if the law so renders the death penalty, I can't stop it, but I personally do not believe in it.

Q Is this for any particular reason? Is this a personal feeling that you have about it or—

A It's a personal belief.

Q All right, Have you felt this way for some number of years or just—is it something you've thought about, you know, more seriously, of course, when you were asked or informed that you were going to be a prospective juror on this type of case?

A Oh, I think I answered that ray gut reaction was that I don't believe in it and I never really thought much further than that. I

* * * *

[506] put aside your personal feelings?

A Yes, I do.

Q I think you've already said you could do that. Do you understand that the convex of that is just as true? Let's say you heard a case where you said, if I could vote, as you've said, I would never, ever vote for a sentence of death. It's a capital murder, but it's not the type of capital murder that anyone should be executed for, but in all intellectual honesty, number one, they proved that to me. I'm being honest about it. It should be answered yes and number two yes and number three yes. Would you go ahead and do that and put aside your personal feelings?

A Yes, I could.

Q Now, let's shift gears here for just a second in the time that I have remaining and let's talk about a situation that I'm not suggesting would occur in any case, much less this one. It's a situation where, again, b1pothetically Ms. Gibson is on a jury and it's a capital murder case. Let's say it's a capital murder and it's murder during a burglary, as an example of another type of a [507] capital murder. How, let's say that

you have heard all the evidence in the first part of the trial, the first phase of the trial, the guilt or innocence phase, and you and the other jurors have no doubt whatsoever that the Defendant in that case committed murder, but you didn't hear any testimony about a any burglary or you have a reasonable doubt about it. Do you understand that for us to expect you to convict someone of capital murder, we have to prove both components of the offense, a i murder and a burglary? Am I making myself clear?

A Yes, sir.

Q We didn't do that though, did we?

A No.

Q So you can't convict him of capital murder. You car. only convict him of what we proved to you and that's the offense of murder. Were that to happen, were you to convict someone of murder and not capital murder, but just murder under the laws of Texas, then you forget all about death, mandatory death and mandatory life. The range of penalty for murder is very broad. In fact, [508] it is as broad as any range for any offense under the laws of the State of-Texas.

Now, let me talk to you a little bit about what murder is and what murder is not. Murder basically is a situation where one person knowingly or intentionally causes the death of another individual without any legal excuse or legal justification. You see, you can kill somebody under certain circumstances and it's not murder. In fact, I'm going to cite four examples for you right now. For example, you can kill someone in self-defense. You could be charged with murder, but you—let's say, if I was charged with murder and you were on my jury and you believed that I acted in self-defense, reasonable self-defense, you would have to find me not guilty. Do you understand that?

A Yes.

Q Because I would have to find you not guilty if it was I on your jury. You can kill somebody—you have a right to

self-defense and so do I. We're not thinking about murder when we talk about the range of penalty. We're not talking about self-defense when we [509] talk about that sort of thing. That's not guilty. It's no offense.

The same thing would hold true if you believed that someone charged with murder acted accidentally. It was an accident. The gun fell or the gun went off accidentally or however it was. That's not murder, either. That's not guilty if you believe that—or if you felt someone was insane. As much as people get up in arms about the insanity plea these days, if you honestly believe or have a reasonable doubt that the person charged with murder acted because he was insane, you have to find him not guilty. It's not murder. if it's a situation where someone killed somebody in the act of sudden passion, in other words, the heat of sudden passion, that's not murder, either. In other words, if a father were to come home, God forbid, and find out that his little daughter had been sexually abused by a neighbor and the neighbor was up the street laughing about it and he goes into a rage. He flies off the handle, picks up a gun, runs down the street and kills the neighbor. The law doesn't excuse that. Some people think it is [510] temporary insanity. The law doesn't excuse that behavior, but it doesn't call it murder. If you believe those facts and you're on a jury, you wouldn't convict that individual of murder because it is not murder. It's voluntary manslaughter basically. Do you see what I'm getting at?

A Yes.

Q What I'm saying is, I want to draw a clear distinction between what murder is and what murder is not when we talk about the range of penalty, that broad range of penalty. Again, I don't want to dip back into the cliche bag, but the law expects a juror to be able to tailor the penalty in a murder to fit the facts as they decide them to be.

Let me ask you: Erasing the self-defense, erasing the accident, erasing insanity and erasing the crime of passion,

let me ask you, what do you personally feel the minimum penalty ought to be for someone who knowingly and/or intentionally causes the death of another individual, commits murder? What do you feel the minimum penalty ought to be under any facts and circumstances?

[511] A I don't know. I've never thought about it before.

Q All right. Let me ask you this: The range of penalty under the laws of the State of Texas is as low as five years, as high as ninety-nine years or life and an optional $10,000.00 fine and the law expects a juror, if they can in all honesty, to be able to set the penalty to fit the facts after they've heard all the evidence, if they can. Erasing those other qualifications, they don't mitigate a murder by saying, "I think he might have been insane and I'll give him five years." If you think someone, is insane, you forget about it and you find him not guilty. Am I making myself clear?

A Yes, sir.

Q I just want to make sure you're not considering those things. Let me ask you: Do you believe you could ever set a penalty as low as five years if you felt the facts and circumstances warranted it? In other words, do you feel, whatever the set of facts and circumstances to your way of thinking would ever justify a sentence as low as five years in [512] the Texas Department of Corrections for a knowing and intentional murder?

A Yes.

Q Okay. I gather, if you heard facts and circumstances that called for a sentence as high as ninety-nine years or life, could you do that?

A Yes, I could.

Q And even an option of a $10,000.00 fine?

A Uh-huh.

Q One other matter. Let me ask you this: Could you—the law allows the State to prove either a capital murder or a shoplifting case or a rape case or whatever the case may be using the testimony of one eyewitness to the case. If you

believed the eyewitness and you believed the eyewitness is capable of testifying as to all the allegations contained in the indictment—okay?

A Uh-huh.

Q Like I say, whether it be a capital murder or whether it be shoplifting a package of chewing gun, how do you feel about that? Do you believe that in a case of this

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[523] please.

(Whereupon, Ms. Gibson left the courtroom, after which the following proceedings were held.)

THE COURT: Mr. Macaluso, I hold the juror is qualified. You-all may want to discuss what you want to do.

MR. MACALUSO: Judge, we would be pleased to exercise a preemptory challenge.

THE COURT: Bring her back in, Ted.

(Whereupon, Ms. Gibson returned to the courtroom and the following proceedings were held.)

THE COURT: Ms. Gibson, you've been excused from service in this case, which means you can leave here and go back to your job, your home or whatever. I'm not going to let that happen though without thanking you for

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[527] CAROL A. TAYLOR, called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. NELSON:

Q Good afternoon, Ms. Taylor. As I was introduced to you on Monday, my name is Jim Nelson and sitting next to me is Paul Placaluso. I think you'll remember that on Monday there was a gentleman sitting right at the corner of that table. His name is Norman Kinne. The three of us are assistant criminal district attorneys here in Dallas. We've been assigned to present the evidence for the State of Texas in this case. Seated to my left is Mr. Brice Cunningham.

MR. CUNNINGHAM: How are you, Ms. Taylor?

MS. TAYLOR: Fine.

Q To his left is Royce West.

MR. WEST: Good afternoon, Ms. Taylor.

Q These two gentlemen have been

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[529] myself clear on anything.

You're a prospective juror in this case. We have one juror at this time. We need eleven more. What we're going to try to do in the next few minutes is get to know as much about you as we can in a little bit of time. In order to do that, we're going to as some questions that—I'm going to ask you for some personal feelings about things and that's part of the reason, I think, you're in here by yourself rather than with the entire group as you were on Monday. I didn't notice, but have you been on jury service before, ma'am?

A No.

Q If you have been, you would have probably spent most of your time in a group out here with forty or fifty other people aid we would have talked to you in that situation rather than individually. Since this kind of case has so many

weighty issues in it and it calls for some very strong personal opinions, we feel like maybe you could be a little bit more open this way and we hope that you will be.

I want you to know right up front [530] what the position of the State of Texas is in this case. We are now and are _going to continue to actively seek the death penalty for the man at the far end of the counsel table, Thomas Joe Miller-E1. We feel like you have a right to know that so you'll know what you're dealing with going in. We plan t,o present to you sufficient evidence for you to find beyond a reasonable doubt that he's guilty of the offense of capital murder and we plan to give you the type and qualify of evidence to convince you that you can answer each of those three questions yes, along with the other eleven jurors that serve on this case. The result, if you and your fellow jurors answer each of those questions yes, is going to be an automatic death penalty for this Defendant. So that's where we are.

Now, I notice in looking at your questionnaire—I know you did this in the hallway or at lunch or something and didn't have a whole lot of time to look at it or think about it, but there was a question on there about the death penalty. I'm going to ask you again, if you would, to just tell us how you [531] feel about the death penalty.

A. Well, let's see. I've never, you know, had to make a stand on this before, so when I was asked, I thought, yeah, I think I do believe that, if someone has committed a crime that's bad enough that the Court's think that he should be put to death, well, yes, I think that he should be because he doesn't need to be out in society any longer. I think the Bible says an eye for an eye.

Q You feel like it serves a purpose then; is that right?

A Yes, I do.

Q Okay. Would that purpose be -you've mentioned taking him out of society. Is there also a deterrent effect?

A You mean like life in prison or something like that?

Q Well, no. What I'm asking is, do you feel the possibility of the death penalty or the fact that it is there might be a deterrent to persons who are considering committing certain types of crimes?-

A They should think about it, but I don't think it's used quite enough that it

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[548] Now, something we don't expect to happen, but that might happen is, a person-would just be ' proved guilty of murder. Do you remember that I told you that we had to prove both the murder and it was in the course of committing robbery?

A Right.

Q Well, let me use a hypothetical. Let's say we have a person who is charged with capital murder during a burglary and we prove to you that he either knowingly or intentionally caused the death of another human being, but we didn't bring you any evidence about a burglary at all, just nothing about a burglary. Now, we haven't proved capital murder in that case, have we?

A It depends on what you're defining as capital murder.

Q Remember that I told you, for it to be capital murder, it has to be murder in the course of another offense.

A Right.

Q We aren't talking about killing a police officer or killing a fireman, but if all we prove that he caused the death of another individual, then that's just murder?

[549] A Right.

Q Okay. Murder in the State of Texas carries a punishment range of anywhere from five years up to ninety-nine years or life and an optional fine of up to $10,000.00. There's no death sentence in just a regular murder. In order for you to be qualified to serve as a juror on this case, you have to be able to consider that entire range of punishment for the offense of murder. Now, I can't give you any examples, but I

think you would probably agree with me that there are a multitude of situations in which one person could cause the death of another person knowingly or intentionally. Even though it's not self-defense and it's not an accident and it's not juktified in any way, there's still a multitude of background and surrounding circumstances that could come into play in something like that. Would you agree with me about that?

A Yes, I do.

Q Okay. What we need to know from you, Ms. Taylor, is whether—if you feel, after hearing all the evidence, that the facts [550] and circumstances justify a sentence of ninety-years or life for murder, could you give it?

A Could I give—

Q Yes, could you give it, if that's what the facts and circumstances called for?

A Yes.

Q Okay. Let's turn it around. If you felt, after hearing all the evidence, that the facts and circumstances called and justified a sentence of five years for the offense of murder, could you give that?

A Yes.

Q Okay. We aren't asking—

A I don't understand why you're asking me.

A Well, you have to us that you're able to consider the entire range of punishment. There are some people who might come in here and say, "No, there's no way I can give ninety-nine years for a murder case. I just can't do it. It's too long and I don't feel it's right." or the same thing on the five years. We have a right to know and the defense has a right to know that, since the legislature has set that entire range of punishment, you [551] could consider that entire range.

A Right. Sure. They know about the laws than I do and whatever they say, yes.

Q Okay. Now, basically what we're going to ask you to do on the guilt or innocence phase and on the punishment

phase is to listen to the evidence and base your verdict on the evidence. Now, can you tell us that you will keep an open mind as to all the evidence in this case and not make a decision until you've heard all of the evidence?

A Sure I will.

Q And base your verdict on all that evidence after you've heard it?

A Right. Yes.

Q Okay. Now, we don't have to prove—let me back up. TV shows and that kind of thing, you hear a lot about motive for murder, premeditated murder. I understand that may be the law in California. I don't honestly know, but here in Texas, we don't have to prove to you what the motive was for a murder or for any other crime, for that matter. We don't have to prove to you that it was premeditated in any way. Do you understand that?

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JOHN D. NELSON, called as a jury panel member, having been duly sworn by the Court to testify to the truth, the .whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Dr. Nelson, good morning. Let me begin by reintroducing everyone here at the tables, or most everybody here. My name is Paul Macaluso and to my immediate left is Jim Nelson.

MR. NELSON: Good morning, Doctor.

Q Way back on Monday when we were first introduced, there was another gentleman seated here. His name is Norman Rinne. The three of us are assistant criminal district attorneys here in Dallas. We work for Henry Wade who, I'm sure as you know, is the district attorney here in Dallas.

We've been designated as the lawyers to represent the State in this particular case. Now, to Jim's immediate left is Mr. Brice Cunningham.

MR. CUNNINGHAM: How are

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[603] the better citizens because they have a certain feeling about the death penalty than those who do not.

What we want to know ultimately at this time is how Dr. Nelson feels, okay? I know you've been asked this question, number fifty-six, about how you feel about the death penalty and we've given you three lines there to answer that and precious little time to think about it really. Would you share with us your feelings, Dr. Nelson, your personal feelings about the death penalty and then, secondly, your ability or inability to actually serve on a case like this and render a verdict that would result in the execution of this Defendant in this case?

Before you do that, I forgot one thing. I'm going to state one thing at the beginning. The State is actively seeking the death penalty in this case. We think it only fair to tell all the jurors initially what our position is with regard to this case. We are actively seeking the execution of Thomas Joe Miller-E1 for the offense for which he's been accused and indicted. That is, we intend to be [604] able to provide a jury, once it's selected, with the type and the qualify of evidence, Doctor, that would convince a jury in the first phase of the trial that Mr. Miller-E1 is guilty exactly as he's been charged with the offense of capital murder. Then, as you know, in the second phase of the trial where the penalty is actually returned, once again we intend to be able to provide a jury, once it's selected, with the type and the qualify of evidence that would convince them beyond any reasonable doubt that those questions should be answered yes. You know that the result of three yes answers is an automatic sentence of death, a

mandatory sentence of death under the law. The Judge has no power, of course, to override that. Now, that's our position, but, of course, ultimately it's the position of the jury that controls, but I think it's only fair to tell you in all honesty and as straight forward as we can what our position is and what we're seeking and ultimately that is, at the end of this trial that Mr. Miller-El be put to death under the law. Now, let me just go back to the question I asked you earlier. Would you share with us [605] your feelings about the death penalty and your ability to actually serve on this case, if you can?

A Yes, sir. Before I do that, I made an error on that questionnaire that's been bothering me since Monday. There was a question whether any members of my family or close friends or lawyers and I said no. I forgot about my nephew who is a city attorney in Duluth, Minnesota.

Q He's a city attorney?

A In Duluth, Minnesota.

Q Thank you for telling us that. You didn't commit even a misdemeanor by not putting that on there. Go ahead.

A I do not believe in the death penalty. I suppose this goes back to my childhood because both my parents felt rather strongly against the death penalty. I just believe -- for two reasons, probably; one, morally I don't think it's right to take anyone's life. I don't care what the reasons are. Secondly, the law isn't perfect and there are always chances for errors to be made.

Q Okay. You've stated your position

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[668] HAROLD K. SOHNER, called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. NELSON:

Q Good morning. Is it Mr. Sohner; is that correct?

A That's correct.

Q I think I was introduced to you on Monday. My name, again, is Jim Nelson. I'm going to reintroduce the other folks here. Sitting next to me is Mr. Paul Macaluso. The other gentleman who was seated over here at the table the other day, if you remember, was Norman Kinne. Mr. Kinne, Mr. Macaluso and myself are assistant criminal district attorneys here in Dallas. We've been assigned by Henry Wade to handle this case for the State of Texas.

Immediately to my left is Mr. E. Brice Cunningham.

MR. CUNNINGHAM: How are you, Mr. Sohner?

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[670] sometimes. If you have something that you need to say or a question on some issue I haven't made clear, please stop me and let's make sure that we're clear on things, okay?

A Yes.

Q Mr. Sohner, I feel like it is only fair to you that you know up front what our position, the position of the State of Texas, is in this case. our position is that we are actively seeking and will continue to actively seek throughout the trial the death penalty for that man at the far end of the counsel table, Thomas Joe Miller-El. We plan to present to the jury and to you, if you're on the jury,' a sufficient amount and qualify of evidence, number one, for him to be found guilty of capital murder and, number two, for the death penalty to be assessed. I feel like it is only fair, as I've said, that you know that going in, that that's what we're going to try to do. I'm not going to try to pull the wool over your eyes. Although I'm a lawyer and have been for a few years, I'm going to try not to talk too much legally or too much lawyer talk and I'm not

going to argue with you. I don't think [671] anyone is. We certainly don't mean to. Obviously, there aren't going to be any right or wrong answers to what any of us have to ask, Mr. Sohner. We're just trying to find out—I've expressed to you our feelings and we need to know—and Mr. Cunningham and Mr. West and the Judge are going to listen at the same time as I'm talking to you—your feelings on things because that's what is going to count. Obviously, we're trying to find the twelve people best suited to serve on this particular jury in the trial of Thomas Joe Miller-E1.

With that kind of introduction and opening, which tends to run a little long sometimes, you had a chance on Monday to fill out a questionnaire. One of the questions on there, as you probably remember, was number fifty-six and that's your feelings about the death penalty. You filled it out at that time and I would like you, if you would, to tell us again today exactly what your feelings are about the death penalty?

A It's a situation that I—until one is put into the position of answering that question and saying I'm going to be one of the

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[723] BILLY J. WAGONER, called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Good afternoon, Mr. Wagoner. Mr. Wagoner, let me begin by reintroducing every one here at the table. My name is Paul Macaluso and to my immediate left. is Jim Nelson.

MR. NELSON: Good afternoon, Mr. Wagoner.

Q Mr. Wagoner, you may remember, on Monday when we were all introduced to you, there was a man seated over here. His name is Norman Kinne. Mr. Kinne, Mr. Nelson and I are assistant criminal district attorneys here in Dallas. We work for Mr. Henry Wade, who is the district attorney, as I'm sure you know. We've been designated as the lawyers to represent the State of Texas in this case.

Now, to Jim's immediate loft is Mr. Brice Cunningham.

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[728] question that you want to ask?

A No.

Q If there is something that you wish to add or a statement you wish to make because it was not asked by the rightquestions, if there's something you need to tell us, then by all means tell us, if you feel it's going to affect your service as a juror, okay?

A Okay.

Q Now, let me tell you where we stand on this case, that is the State. We are actively seeking the death penalty in this case, Mr. Wagoner. In; other words, we intend to be able to provide the jury, once it's selected somewhere down the line, with the type and quality of evidence that would convince them beyond a reasonable doubt under the law that the Defendant is guilty exactly as he is charged in this indictment. That's our burden. We have to do that and we intend to do that in this case based on the evidence.

In the second part of the trial when the penalty is determined, once again we intend to be able to provide the jury in the [729] case with the type and quality of evidence that will convince them beyond any reasonable doubt whatsoever, which again we have to do, that those three questions that determine life or death should be answered yes. Like the Judge said the other day, if all the questions are answered yes in the second part of the trial, then the law

requires that he assess a penalty of death for the Defendant. That's just our position. The reason I mention that is just to be fair to you and tell you up front where we stand with regard to the evidence. You understand from your other service what the lawyers think really doesn't matter. It's what you, as a juror, thinks and the decisions you make based on the evidence.

Now, let me just ask you, Mr. Wagoner, I know they asked you this question on the questionnaire, but let's just talk about it a little bit again. Let's just have a little informal discussion here, if we can. Tell us how you feel generally speaking, in your own words, about the death penalty and capital punishment. How do you personally feel about it?

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[754] the questions based on the evidence that you hear?

A Yes.

Q Do you see what I'm getting at? in other words, you could be on a jury and you could say, well, I think that person ought to die, you know, if I could vote, I'd probably vote for death, but the law doesn't allow you to do that, does it?

A. I wouldn't want.it to.

Q The law expects you to simply answer the questions on the basis of the evidence and put aside your personal feelings and just answer the questions. That's all.

A Very much so.

Q Can you do that?

A Yes.

Q Let's shift gears for just a second because I don't have a whole lot of time left. Let me talk to you about a situation—and I'm not suggesting that this would happen in this case, for a minute, but we have to discuss it now. Let's imagine for a moment that Mr. Wagoner is on a jury. Okay. Just imagine it for a second. A. capital murder jury [755] and let's say we've accused somebody of committing murder during a burglary,

that's capital murder that we've proven. Do you a understand that we have to prove both the murder and a burglary if we expect you to find him guilty of capital murder?

A Yes, I understand that.

Q But let's say at the end of the testimony, you say, well, I believe he committed murder. They proved that all right. Sure thing, but they didn't prove anything about any burglary or i doubt it was during a burglary. Well, you see, if that were to happen, you have to find that Defendant not guilty of capital murder. Do you understand that?

A Yes.

Q Because we didn't prove capital murder, did we?

A According to the law, you didn't prove it.

Q What did we prove?

A The murder and that was all.

Q Let's imagine for a moment if that were to happen. Let's say you're on that [756] jury and you've just found someone guilty of murder, okay, because that's what we proved. You can forget all about automatic life and automatic death in a regular murder case. Do you understand that?

A Yes.

Q The range of penalty—the law gives you a very broad range of penalty—the judge talked about this the other day—for the offense of murder. It's no longer life or death. It's from five years to ninety-nine years or life. All the law expects you to do to be qualified as juror is this, basically, is to be open-minded, as I believe you are, and be willing to tell us that you will keep an open mind until you would hear the facts of a murder case. Now, you haven't hear any evidence, have you?

A No.

Q And obviously you can't make up your mind until you have heard the evidence, can you?

A No way.

Q And that's all the law expects of you. You can just tell all of us here that you [757] have an open mind and you will

wait and listen to the evidence and, once all of the evidence is in, you will decide what the proper penalty ought to be based on what you feel is proper and justified and warranted by the evidence and the facts. Can you do that?

A Yes.

Q In other words, if you hear a murder case and you know murder is where one person knowingly or intentionally causes the death of another. That's murder. You've heard the facts of a murder case—and, you know, all murders involve a death, obviously, and they're all going to be bad. Maybe some are just worse than others, okay? The law just says that you be the type of person who would wait and listen to the evidence and, if you hear a case that calls for the minimum—after you've heard the facts, you decide it calls for the minimum punishment, you could give the minimum punishment, if you feel that's the right thing to do and the proper thing to do under the facts as you hear them, okay?

A Yes.

Q Can you do that?

[758] A Yes.

Q If you hear a case, after you've heard all the facts and you follow the law, that you feel calls for the maximum punishment in a murder, would you be able to do that as well?

A Yes.

Q Or obviously anywhere in between, just like you did in that other case?

A Yes.

Q All right. Now, let me just cover one little thing here. The range of penalty, as you know, is from five years to ninety-nine years or life and a $10,000.00 fine. Are you saying that, if you felt, after you heard the facts of a murder case—you know, some murder case, if you felt that the minimum was the proper thing, could you give as low as five years in the Texas Department of Corrections as the law allows for murder?

A From the facts that were presented, yes, I could.

Q If you felt it was the right thing to do, the proper thing to do, and the just thing to do, after you heard the facts, if you [759] said, this is a case—I never thought I'd see one, but this is it—where the minimum is five years, I'll give five years because that's a the law?

A Yes, I could.

Q All right, The same thing would hold true for the maximum. If you say, well, this is about as bad as you can get and I believe these facts are horrible and I think he should get the maximum, if the maximum is ninety-nine years or life and a $10,000.00 fine, you could do that, as well?

A. I sure could.

Q Obviously, what you're saying is, you woul d wait and listen to the f acts and you and the other jurors would tailor the punishment to fit the crime. Can you do that?

A Yes.

Q Any question about that at all?

A No.

Q Now, just one or two other things here and then these other lawyers will have a chance to talk to you, as well. I think the Judge covered this, but I'm not sure. The law allows that a person can be convicted of murder

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[829] proceedings were held.)

MR. NELSON: We would like the record to reflect that Mr. Gitchaway was a black male excused 'by agreement.

MR. WEST: Your Honor, I think that the record should reflect that I concur with Mr. Nelson,. the attorney for the State, that the record should reflect that, that Mr. Gitchaway is a black male.

THE COURT: Ask Ms. Allen to come in, please. Ms. Allen, how are you doing?

MS. ALLEN: Okay.

THE COURT: First of all, let me explain or, apologize to you. We got you here at 1:00 o'clock and we didn't get you in here—into the courtroom until about 2:30. We don't know how long it's going to take to talk to an individual when we start out, so I asked all of you

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[837] THE COURT: Pursuant to my procedure last week, I'll first ask the State if they wish a shuffle?

MR. NELSON: Yes.

MR. WEST: Could we ask the reason for the shuffle?

MR. NELSON: No.

MR. WEST: For purposes of the record, I would like the record to indicate that within the first ten jurors, prospective jurors, four are black. Within the second set of ten prospective jurors, three are black and within the third set of prospective jurors, two are black and the fourth set of prospective jurors, one is black.

THE COURT: I'll grand the State's motion to shuffle. I'll ask someone on behalf of the State and the Defendant to go down and do that as quickly as possible. I'll recess the jury and explain [922] VIRGINIA R. SMITH, called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. NELSON:

Q My name, as I was introduced to you yesterday, is Jim Nelson. I'm going to be talking with you this morning. The first thing I want to do is reintroduce all the people here. To my immediate right is Paul Macaluso. Another gentleman, who isn't here, who is home, I find out now, with the chicken

pox as a matter of fact, is Mr. Norman Rinne. Mr. Kinne, Mr. Macaluso and myself are assistant district attorneys here in Dallas. We've been assigned to handle this case for the State of Texas. To my immediate left is Mr. Royce West.

MR. WEST: Good morning.

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[1005] Mr. West. The lady—she's been in the witness bo-x for about an hour and a half with some time out when she was out in the hall, I'm going to sustain the State's challenge to this juror for cause. I'm going to note for the record that I think she was questioned very thoroughly. The Court finds that she—her basic problem, as I interpret it, was that she would just simply be unable either to take the oath initially because of her feelings about the death penalty, knowing the result of her verdict would be the imposition of the death penalty by the Court, or if she were sworn for some reason or another, then her ability would be seriously impaired or affected by her deep-seated feelings about the death penalty. Her demeanor on the stand, as you've noted; she did tend to vacillate to some extent. She appeared to be

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[1012] JAMES D. HOLTZ, called as a Jury panel member, having been duly sworn by the Court to testify to the truth, a whole truth and nothing but the truth; was examined and testified as follows:

EXAMINATION

BY MR. MACALDSO:

Q Good morning, Mr. Holtz.

A Good morning.

Q Let me begin by reintroducing most everyone who is here. I'm Paul Macaluso. This is Jim Nelson.

MR. NELSON: Good morning.

Q Once the trial beings, another gentleman will be with us and his name is Norman Kinne. Believe it or not, Mr. Kinne is about fifty years old and he has the chicken pox. He's the lawyer, as the Judge said, who is actually going to be presenting the evidence on behalf of the State once the trial begins. We are assistant criminal district attorneys who work for Henry Wade and we've been designated to represent the State, okay?

A Okay.

Q Now, you can see Mr. E. Brice

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[1016] will have to make some tough decisions on this case. We just want to know if the people that we talk to are qualified and suited to this type of case. If they're not, obviously now is the time to let us know. If you have a question, Jinn, about anything at any time, ask it.

A Okay.

Q If there is something you want to tell us, tell us, all right?

A Okay.

Q Like I said, bear in mind that no one is going to argue you in or out of a position. Just let us know how you feel.

A Okay.

Q Now, I want to let you know how we feel based on the evidence. We're actively seeking the death penalty, Jim, in this case. We make no bores about it. I'm going to tell you up front as we've told all the other—you're number twenty—what we've let all the other jurors know at this point, what our position is based on the evidence and that's this: we are actively seeking the death penalty in this case for Thomas Joe Miller-El. [1017] I'm not apologizing for it. I don't feel that we have to. We intend to be able to provide a jury in this case with the type and the qualify of evidence in the first part of the trial which would convince them beyond any reasonable doubt whatsoever that Mr. Miller-E1 is guilty exactly as he has been indicted and charged with the offense of capital murder. All right.

In the second part of the trial, we once again intend to be able to provide the jury, you if you're on it, with the type and the qualify of evidence that would convince a jury beyond any reasonable doubt whatsoever that those three or possibly two questions, whatever, should all be answered yes which, as the Judge explained yesterday, results mandatorially, automatically, in the Judge assessing, death. That's all he can receive, either death or life, depending upon the answers to the questions. Any question about that at all?

A No, sir.

Q We just feel that it is only fair to let you know what our position is, that we are taking an active role in this case for the [1018] death penalty. You understand that ultimately it's up to the jury?

A. Yes.

Q Now, Jim, you've been asked this question, number fifty-six, how you feel about the death penalty and i know they kind of spring it on you, don't they?

A The Judge warned us about it.

Q They give you three lines here and they ask you how you feel about the death penalty. Why don't you share with us, having had an evening also to think about it or to sleep on it, how you personally feel in your own words, number one about the death penalty, and then secondly about your ability to serve or not serve on this type of a case?

A Okay. if I may, I was raised in Rhode island and that's where I spent my childhood and grew up. New England, I'm sure, is noted as a fairly liberal area of the country. Icy view are fairly liberal. Icy position on the death penalty is, I believe in the death penalty in the death of a police officer on duty or, you know, an off-duty officer that is acting as a police officer and

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[1045] could render an impartial decision.

Q Regardless of whether it's a murder during a robbery, murder during a burglary, murder during a rape or whatever?

A Regardless of that.

Q Let's shift gears here for just a second and let's talk about a situation that I'm not suggesting could occur in this or any other capital murder case, for that matter, but would like to discuss it with you because it is important. Remember that I said one of the types of capital murders is a murder plus like a murder during a robbery or it could be murder during a burglary, as an example. You say you could serve on that type o-f a case?

A. Yes, sir.

Q Now, let's say you're on a hypothetical jury, murder alleged to have been committed during a burglary. Let's say you don't have any doubt whatsoever in the first phase of the trial that the murder was committed, the Defendant is guilty of murder, no question about it, it's obvious, but let's say you didn't hear any testimony about a burglary or you have a reasonable doubt. [1046] There's a doubt in your mind whether the murder actually happened during a burglary. Well, you know if you're expected to find someone guilty of capital murder, we have to prove the murder and the burglary. We've only proven the murder; is that right?

A Right.

Q You can't find somebody guilty of capital murder under those circumstances?

A No, sir.

Q You must find them not guilty of capital murder and find there guilty instead of what the State did prove, which is what?

A Manslaughter?

Q No, murder, just regular murder. Murder is a situation—and I want you to bear this in mind—where one person knowingly and/or intentionally causes the death of another

individual and that's done without any legal excuse or any legal justification. Now, I want to harp on that for just a second because I want to make sure that—you said manslaughter there and we'll talk about that in just a second. You've convicted someone of murder and we're not talking about mandatory [1047] death or mandatory life. There's a different range of penalty altogether.

A Right.

Q But I want you to understand what murder is and what murder is not. For example, I said where one person knowingly or intentionally or both causes the death of another individual without any legal excuse or legal justification. Let me give you some examples of what we're not talking about when we're thinking about murder and the range of penalty. For example, if I killed Mr. Nelson over here because I believe he is going to kill me or inflict serious bodily injury on me, I could be charged with his murder, but if you were on that jury, Jim, and you believe that I acted in self-defense or if I were on the jury and I believed that you acted in self-defense, I would find you not guilty of murder just like you would have to fine me not guilty of murder because that is a legal excuse, self-defense.

A Right.

Q So when you think about the range of penalty for murder, don't be thinking about self-defense because you don't say, well, [1048] that's mitigated. It's not mitigated. It's a defense. Do you see what I'm getting at?

A Yes, sir.

Q The same thing would hold true if you believed I killed Jim by accident. Let's say the circumstances look like murder, but if you believe or have a reasonable doubt, if you're on the jury, that it was an accident, not guilty.

A Right.

Q Not mitigation, not a lower penalty, not guilty. Don't be thinking about that. The same thing would hold true of what you said about insanity. You don't lower the sentence

for somebody because you think they're insane or maybe were insane. If you believe beyond a reasonable doubt or have a reasonable doubt about it that someone committed a homicide that would otherwise be a murder, believed they were insane, not guilty. Any problem with that?

A No, sir.

Q One last category and here's a situation that you mentioned earlier, manslaughter. Let's say you believed the [1049] situation where someone killed somebody and it would ordinarily be murder but they acted under the influence of sudden passion from an adequate cause. For example, a father comes hone and finds out that his young child had been sexually molested by a neighbor up the street who is up there laughing about it. He's overwhelmed by what he sees and he flies off the handle, picks up a gun or a pitchfork and runs up the street and kills his neighbor. If you believe that he acted under the sudden influence of passion from an adequate cause and you know that might be an adequate cause because he was so enraged, that's not murder. That's what we call voluntary manslaughter. It's a different range of penalty altogether.

Now, excluding all those things, we do not mitigate the offense. Remember we're talking about a situation where one person. knowingly and/or intentionally causes Che death of another. There's no legal excuse, no justification under the law. What do you personally feel should be the minimum number of years a person should be required to serve for that sort of offense?

[1050] A. Well, that's tough. You know, I don't know what the range of penalties are, but my personal belief is life in prison.

Q Like I said, no one is going to talk you in or out of a position.

A. Now, that is my personal belief. I don't see any number of years.

Q Okay. Now, let me ask you this: Bearing in mind what we talked about—and I'm running out of time and I'm not going to be able to go over all these categories with you. Jim, knowing yourself and in all honesty, being as honest with us as you've been to this point, the law allows a different range of penalty altogether. The law says that the range of penalty is as broad as it can be for any offense, for murder. We want to know how you feel. Do you see?

A Okay.

Q Do you feel you could ever hear fact: and circumstances where you feel it would be proper, where one person knowingly and/or intentionally—he knew and intended to kill that individual, absent of those other qualifications, those four that I gave you, [1051] would you ever under any circumstances, could any proof ever satisfy you that it would be proper that a person should receive as low as five years in the penitentiary for murder.?

A No, sir, no.

Q You feel very strongly about that, don't you?

A Yes, I do.

Q You said it should be life; is that right?

A Yes, sir.

Q Now, the law does allow you in a murder case to consider—you know; to take into consideration the facts and circumstances, but eliminating those four categorses, I gather from what you're saying; five years for a human life under those circumstances would never be proper?

A No, sir.

Q Under any stretch of the imagination?

A No. It would be inadequate in my beliefs.

Q If I ever tried to talc you into that, I would be beating my head against a [1052] wall.

A You would be talking to a stone wall.

Q I would be talking to a stone wall because that's the way you feel about it?

A Yes.

Q Like I said, I don't have the right to quarrel with you or dicker with you .about your personal feelings; Tim, or anything else for that matter. That's not our responsibility. Are you saying then, if you were on a murder case, there would be simply no way you could assess a penalty as low as five years regardless of the facts and circumstances in a murder case, knowingly and intentionally causing the death of another individual?

A No

Q You could give life?

A Yes.

Q But nothing—

A Nothing, along the line of five years. If the person was eighty years old, you could drop a sentence to forty years or something, but essentially life.

Q Jim, you've been very polite and

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[1063] Your Honor.

THE COURT: I have a call in for furor number four. T told her to come at 1:45 and since we still have to talk to the next juror—anything else, Mr. Macaluso? All the voir dire is finished; but—

MR. MACALUSO: I just want to ask Jim if he feels bad about what happened two weeks ago in New Orleans?

MR. HOLTZ: The New England Patriots? I had to cook a lobster. Dinner for some friends of mine.

THE COURT: What says the State?

MR. MACALUSO: The State will exercise a Preemptory challenge.

THE COURT: Mr. Holtz, you will e excused from service in this case. I want to thank you, first of all, for your patience with us yesterday and again today and more important than that for

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[1070] SANDRA L. JENKINS, called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. NELSON:

Q Good afternoon, Ms. Jenkins. As I was introduced to you yesterday, my name is Jim Nelson and sitting next to me, again, is Paul Macaluso. There will be a third lawyer, as.I believe the judge told you yesterday, involved in this. He is a gentleman by the name of Norman Kinne. Mr. Kinne, who I guess is around fifty years old, has the chicken pox. Because of that he's not here. He's at home trying to get over that. The three of us repiesent the State of Texas in this case. We're assistant district attorneys and we've been assigned this ,case by Henry Wade your elected district attorney.

Sitting immediately to my left is Mr. E. 8rice Cunningham.

MR. CUNNINGHAM: How are you doing, Ms. Jenkins?

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[1072] McDowell said and that is, we would like you to relax as much as you can with you upon the witness stand and all of us out here looking you.

A. All right.

Q As you talk not only to me, but the other lawyers and the Judge will be listening at the same time because the Judge is the one who has to make the final decision on this. I want you to remember one thing and that is, there is no right or wrong answer to anything anybody is going to ask you. Your answers are not going to show you to be a good citizen or a bad citizen or a good person or a bad person. We're just trying to find out about you because the bottom line is, we want twelve people over here who can serve on this type of

case. It takes, I think everybody would agree, a special kind of person to serve on this particular case because what we're dealing with is capital murder.

Capital murder has only two possible punishments, either a sentence of life or a sentence of death and that's it. I want you to understand, as we're going into this [1073] thing, Ms. Jenkins, what our position is. We, representing the State of Texas, have been and will continue to actively seek the death penalty for that man down there, Thomas Joe Miller-E1. We feel like we will be able to present to you the type and quantity evidence for you to convict him, if you're chosen as a juror, of the crime of capital murder and, once he is convicted of capital murder, answer those three questions on the board yes resulting in the death sentence for Thomas Joe Miller-E1.

So that's where we are. That's our position and that's we anticipate asking the jury to do once all of the evidence is in. Now, you, yesterday, filled out a fairly lengthy questionnaire and one of the questions on there, number fifty-six, asked about your feeling on the death penalty. I know that this was something you probably weren't prepared for and didn't have a whole lot of time to think about it before you answered the question, so I'm going to ask you again, if you would, to just put in your own words your feelings about the death penalty.
[1074] A I feel that, if it would be proven beyond a reasonable doubt that the death penalty is warranted, that's what sentence should be given. I think I went on to further explain that I think a harsher treatment is life imprisonment with no parole.

Q Okay. Now, I would guess from what you're telling me then, you feel like the death penalty serves a purpose in our society; is that right?

A Yes, very definitely.

Q What type of purpose? What pops into your mind as the purpose of the death penalty?

A The purpose of the death penalty—well, there could be several purposes. It can act as a deterrent. It obviously, from a taxpayer's standpoint, instead of sentencing someone to life in prison, it's a little less expensive, but really that is not the point even here or there. I'm a little nervous here.

Q I understand. I know it's tough to relax sitting up there and going through these things, but—

* * * *

A I'm still with you.

Q Okay. Now, one thing that we don't expect to happen and we don't anticipate happening in this case, but may happen, is that we don't prove capital murder. Let's say, for example, that we have a case where we've alleged murder in the course of a burglary and we prove to you that the Defendant knowingly or intentionally caused the death of another but we don't prove anything about a burglary, nothing at all. Therefore, we don't have capital murder, do we?

A No, we don't.

Q We just have murder?

A Correct.

Q Okay. The range of punishment for murder, just regular murder, does not include the death penalty in the State of Texas. The range of punishment for the offense of murder ,is anywhere from five years up to ninety-nine years or life in the Texas Department of Corrections, a sentence of five years up to ninety-nine years or life. In order for you to be qualified to serve as a juror on this case, you have to be able to consider that entire [1095] range of punishment if the person is convicted of murder. When I talk about murder, I'm not talking about self-defense or accident or 'insanity because, if any of those are the case, then the person is not guilty, okay?

A Okay.

Q If the killing is done in the heat of passion—for example, one incident I've heard talked about would be

where a father came home and his four year old daughter had been raped and the neighbor did it. He was standing down the street laughing about it. He goes and gets his deer rifle and goes down there and shoots his neighbor because he's so enraged by what happened. That's a killing in the heat of passion, but that's voluntary manslaughter. It's not murder. Murder is the knowingly or intentionally causing the death of another individual without any legal justification whatsoever, okay? You have to be able to consider for that type of offense the entire range of punishment.

Now, when I say "able to consider", I don't mean that you have to be able to tell us right now you will give five [1096] years or be able to tell us right now that you will give life because you haven't heard any of the facts. You don't know what the facts are at this point and we can't tell you. Now, would you agree with me that there is a myriad of circumstances in which one person could knowingly or intentionally kill another person?

A Definitely.

Q You could sit here for hours and not think of all the different things that could be involved in something like that; is that right?

A_ That's correct.

Q Okay. If you were sitting on a jury and you convicted a person of murder, not capital murder but murder, and after hearing all of the evidence and all the facts and circumstances, if you felt that a life sentence was justified by the facts and circumstances, could you give a life sentence for murder?

A. Yes, I could.

Q If after hearing all the facts and circumstances, whatever they may be, whatever may go into this offense of murder, if you believed from listening to all that, hearing [1097] all the evidence you're going to hear, that a rive year sentence is called for and justified, would you give a five year sentence?

A Yes.

Q Okay. Again, you don't have to be able to sit there right now and even think of what would constitute a five year sentence or what would justify a five year sentence. All jou have to be able to tell us is, if you saw that case, whatever it is, if it calls for a five year sentence, you could give a five year sentence and I believe you're telling me you could do that; is that right?

A That is correct.

Q So you can consider that entire range of punishment, anywhere from five years up to ninety-nine years or life—and there is also an optional fine of up to $10, 000.00 on the end of it. Are you telling me that you could consider that entire range of punishment?

A Yes. As I stated, I think punishment should measure up with the crime.

Q Right, and you're going to keep an open mind and listen to all of the evidence, all the facts of the case and everything else [1098] that's brought to you before you make a decision; is that right?

A Definitely.

Q And that's the same thing you i re going to do even if he's convicted of capital murder, listen to all the facts and Circumstances and all the evidence before you make your decision; is that right?

A Yes, definitely.

Q And that's all we're asking you to do, not to make up your mind right now, but to keep an open mind and listen to everything and then make a decision. Okay?

A All right.

Q Let me touch on a couple of other things just real quickly. Number one, the Judge talked to you about- one eyewitness. He said that the law allows us to prove a case in the State of Texas based on the testimony only one eyewitness if you—

MR. WEST: Excuse me, Mr. Nelson. Your Honor—

THE COURT: I don't believe that is one of our jurors, but you might check, Bob. You're not a

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A As long as the facts were appropriate and I, my own mind, believed that was the justification for the minimum sentence, yes.

MR. WEST: I'll pass, Your Honor.

THE COURT: Mr. Nelson, what says the State?

MR. NELSON: Your Honor, we would be very happy to have Ms. Jerkins serve as a juror in this case.

MR. WEST: We will be very happy to excuse her, Your Honor.

THE COURT: Thank you; Mr. West and Mr. Nelson. Ms. Jenkins, you've been excused frog service in this case which means you can leave here and go about your business. You don't have to stay around any longer. If you will give your badge to the bailiff, we would appreciate it, as you leave.

Off the record, Pam.

(Whereupon, there was an

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[1130] COLLEEN MOSES, called as a Jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Good afternoon, Ms. Moses. How are you doing?

A Fire, and you?

Q I'm doing better than I was yesterday. Let me begin by reintroducing every one here. I'm Paul Macaluso. This is

Jim Nelson. You were not introduced to Norman Kinne. He's the third assistant district attorney assigned to this case. He's not here today and he wasn't here yesterday and he won't be here for three weeks because he has the chicken pox.

A Oh, great.

Q Right, and he's about fifty years old. We work for Henry Wade and we are assistant district attorneys and Mr. Wade has designated us as the lawyers to represent the State in this case. Now, the gentleman to my

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[1134] right questions and you just tell us what is on your mind, you will be doing the right thing and so will we, okay?

A Okay.

Q No one is going to play lawyer with you. That comes from a lawyer, by the way, saying that to you. We're not going to try to talk you into anything or out of anything. If there is something you want to tell us; by all means tell us, whether we touch on on it or not, if there is some question you have at any time about anything we talk about, this is the time to ask it. Don't be bashful. I don't think you will be, but relax and just—and if i don't make myself clear—I tend to really start talking fast at times, so if you don't understand me, just tell me to slow down and I'll be happy to do that.

A I'll raise my hand.

Q All right. That's a deal. Now, let me tell you where we stand in this case so we're just as straight forward with you as we've been with the twenty-one other people we've talked to at this point. The State of Texas, Ms. Moses, in this case is actively [1135] seeking the death penalty for Thomas Joe Miller-El, that man right down there. We make no bones about it and we make no apologies for 'that. The law allows it and we intend to be able to provide a jury, once the trial begins, with both the type and the quality of evidence that would convince a jury—and that would be you; if you're on this jury—that Mr. Miller-El is guilty of capital murder just

as he has been indicted big the Grand Jury beyond any reasonable doubt whatsoever. That's done in the first mart of the trial.

The second part of the trial, where the punishment is determined, once again we intend to be able to provide the jury with the type as well as the quality of evidence that mould convince them beyond any reasonable doubt whatsoever that all the questions the Judge referred to, the two or three questions .you would be asked in that phase, should be answered yes. The result of all affirmative or yes answers is that the Judge must sentence Mr. Miller-E1 to be executed. Do you see what I'm getting at?

A Uh-huh.

[1136 Q Just the same; if there is one or more no answers, the judge must assess a mandatory sentence of life. He has no latitude. The reason I mentioned it is just to put you on notice as to exactly what our position is and what we intend and hope to be able to prove through the evidence once the trial begins and basically, I guess you could say, what the stakes are in this particular case. All right?

A Okay.

Q You understand that ultimately it doesn't matter what the lawyers think, it's what the jury thinks and the decision will be made ultimately by the jury, okay?

A Yes.

Q Now, Ms. Moses, you were asked this question and you knew you were going to be asked it again, I suppose, and that's question number fifty-six and that concerns your feelings about the death penalty. I know you weren't given very much time to think about that before you answered it, but you've been able to sleep on it overnight, haven't you?

A Uh-huh.

[1137] Q Let me ask you, would you share with us; ma'am, in your own words, first your personal feelings about the death penalty and capital punishment generally and then

secondly, your ability or your inability to actually serve in a case of this type as a juror?

A Well, I believe in the death penalty, but I think that it would be—whatever decision that I came to at that time, I can't say right off the bat that I think someone should get the death penalty without knowing the circumstances and all the other things.

Q Well, no one will quarrel with you about that at all. In fact, the law—of whether a criminal offense involves the death penalty or it involves a $200.00 fine, the same things would hold true and that is, you must presume any Defendant to be innocent before you hear any evidence at all. Do you understand that?

A That's true.

Q That's the same thing for Mr. Miller-E1. It doesn't matter how bad an. indictment may sound or how serious a level of

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[1164] Q All right. That's what the law expects of you. Okay. Let's shift gears for just—I didn't forget the third question. That will only come to you if it is raised by the evidence. That just basically asks you if it is a provoked killing or an unprovoked killing. If you decide it is an unprovoked killing, you answer the question yes. If you decide it was a provoked killing, that the deceased did something or said something to provoke the killer, you decide whether the killer acted reasonably or unreasonably. You see, you can answer that question yes or no depending upon the evidence.

A Okay.

Q Let's shift gears—and the Judge is being very patient with me and I need to hurry up here. I want to talk to you about a situation that we're not suggesting would occur in any case, ma'am, but we need to cover it with you. Let's say you're on another capital murder jury. Let's say it's a murder

that allegedly occurred during a burglary. That's another type of capital murder. Do you see what I'm getting at?

[1165] A Uh-huh.

Q Now, let's say you don't have any doubt after you heard the first part of the 'trial that the Defendant committed the murder; but let's say you didn't hear any evidence about a burglary or you had a reasonable doubt about the burglary. If that were the case, Mr. Moses, you understand that, where the State did riot prove both parts of the of offense—we have to prove both the murder and the burglary if we expect you to convict him of capital murder—the law says you couldn't convict someone or capital murder if you didn't hear anything about a burglary. Do you see what I'm getting at?

A Uh-hun.

Q In which case you find the Defendant not guilty of capital -murder because we didn't prove that, did we?

A No, sir.

Q Instead you find him guilty of what we proved, which is what, murder. Now, if that were to happen and let's say that you found someone guilty of regular murder, then it's no longer automatic life or automatic [1166] death. Instead, it's a range of penalty, just like the Judge said the other day, five years to ninety-nine years or life and an optional $10,000.00 fine. That sentence, the number of years, depends entirely on the facts and the circumstances of the murder case. You know as well as I do that there could be an infinite number of situations where one person can murder another. They're all bad, but some are worse than others and the law allows you this latitude to say basically this: That you have an open mind, and I know you do; you will wait until you hear the facts of a murder case and then and only then, once you've heard all the facts, you will decide what the proper penalty should be. Like you may have said earlier or someone said, it's the old cliché about you make the punishment fit the crime. All right?

A Uh-huh.

Q The law wants you to keep an open mind and you tell us that you have an open mind and that you will consider the full range of penalty and assess the penalty somewhere within five years to ninety-nine year or life for murder after you've heard the facts of the [1167] case. Could you do that?

A Yes, sir.

Q In other words, if you hear a case to your way of thinking is proper and it warrants and justifies and calls for a sentence of five years—because that's the minimum—you will give five years for murder. Can you do that?

A Yes, sir.

Q Assuming you heard facts and circumstances that tell you it's the proper thing to do. By the same token, if you hear facts or a situation that you think calls for ninety-nine years to life and you think that is the proper thing to do, once you've heard the evidence—and you haven't heard any evidence yet, have you?

A No, sir.

Q Could you give a verdict of ninety-nine years or life for murder and an optional $10,000.00 fine if you thought that was proper?

A Yes, sir, I could.

Q Or anywhere in between?

A Right.

[1168] Q Any problem with that at all?

A No, sir.

Q I'm out of time, Ms. Moses, but let me just ask you before I let the other lawyers talk to you, do you have any reason whatsoever, whether I've covered it or not, why you couldn't be fair to both sides in this particular case?

A No, sir, I do not know of any reason.

Q Any reason whatsoever why you couldn't give Mr. Miller-El a fair trial here and make the State proves its case beyond a reasonable doubt? Will you make us to that, ma'am?

A Yes, sir, I would.

Q You would keep that open mind?

A Yes, sir, I would.

Q I think you will, too, Ms. Moses. You've been very polite and kind to me.

MR. MACALUSO: I'll pass the prospective juror.

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[1207] PENNY M. CROWSON, called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. NELSON:

Q Ms. Crowson, as yesterday, my name is Jim Nelson and I'm an assistant district attorney here in Dallas County. The man next to me is Paul Macaluso. Another gentleman who will be involved in this trial, if and when he gets over the chicken pox, which he has, is Norman Kinne. Mr. Kinne is another chief felony prosecutor with our office. The three of us are employed by Mr. Wade and have been assigned top this case to handle it for the State of Texas.

Directly to my left is Mr. E. Brice Cunningham.

MR. CUNNINGHAM: Hi. How are you this afternoon?

MS. CROWSON: Fine, thank you.

Q Sitting next to hire is Mr. Royce [1209] here and be asked the questions and discuss things out there in front of forty or fifty other people. Our hope is, by doing it this way, because there are some very strong feelings one way or the other and some very difficult issues involved, that you will feel a little bit more comfortable in answering th questions we have for you.

There are no right or wrong; answers to anything I may ask or the lawyers ask you or the Judge asks. We're just trying

to find out what you think and how you feel about certain thing. If you will be honest with us and answer the questions as openly and as forthrightly as you can, that's all we ask of you. Okay?

A Okay. I'll do my best.

Q As I told you this Defendant is charged with the offense of capital murder. I think it is only fair to you that you know going in what our position is. Our position is we have been and will continue to actively seek the death penalty for Thomas Joe Miller-E1, the man at the far end of the table down there. We feel like we will be able to present to the [1210] twelve persons on this jury the type and quality of evidence sufficient, number one, to convince you that he is quilty of the offense of capital murder. Then when we move to the punishment phase to convince you that each of those questions there should be answered yes.

When each of those is answered yes, the result is the Judge assesses the death penalty. We're talk about those a little more in a few minuts. You had a chance yesterday to fill out this questionnaire and one of the questions related to your feelings about the death penalty. I would guess that it was kind of sprung on you without warning. You didn't know what you were coming in here for really and you didn't have much chance to think about it. Now, that you've had time to sleep in it a little bit, would you tell us again in your own. words how you feel about the death penalty?

A I feel that—you want to know what my decision would be or what the crime would have to be before I would go with that or—

Q That's part of it. But number one basically, you said you were in favor of

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[1252] lawyers here at the side for a second.

(Whereupon; there was an off-the-record discussion between counsel and the Court, after which the following proceedings were held.)

MR. NELSON: Your Honor, the State will exercise one of its challenges.

THE COURT: Thank you, Mr. Nelson. Ms. Crowson, you will be excused from service in this case which means you may leave here and go about your business and give your badge to the plaintiff. I want to thank you for your service and your patience with us. It's been along day and we're still working and we're going to be working for a while longer. I appreciate your patience with us. Thank you.

Ms. Smale, I won't take but a second to say what I want to

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[1255] GWENDOLYN M. SMALE, called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Good late afternoon, Ms. Smale. We're all getting a little bit punchy here.

A That's why 1 wondered if every one is going to look alike.

Q I will get right to the heart of the matter by reintroducing every one here. I'm Paul Macaluso and this is Jim Nelson. When the trial begins, we will be joined by Norman Kinne who, you being a doctor's wife can appreciate the fact that Mr. Kinne is about fifty years old and has the chicken pox.

A I had them at thirty, so I can sympathize with him.

Q He's going to be out for about two or three weeks, so this jury selection better. take at least that long.

To Jim's immediate left, ma'am, is Mr. E. Brice Cunningham.

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[1258] questions, we'll be doing our job and you will be doing yours. No one is going to try and talk you into anything or out of anything. Just let us know how you feel.

If there is something that we don't touch on that you feel is important, you tell us. If you have a question about anything, by all means ask it and we'll do our best to answer it.

Let me tell you what our position is based on the evidence. The State of Texas is actively seeking the death penalty in this case for this Defendant. We make no bones about it. The law allows for it. There is no question about that. We intend to be able to provide a jury, once it's selected, and it could mean you, with both the type and qualify of evidence that would convince them beyond any reasonable doubt that the Defendant is guilty of capital murder exactly as set out in this indictment. That's done in the first part of the trial.

Then again in the second part of The trial, we intend to provide a jury with the type and quality of evidence that would [1259] convince them beyond any reasonable doubt that all the questions should be answered yes which, as you know from what the Judge said yesterday, would require the Judge to assess a sentence of death for Mr. Miller-El. That's the reality of this situation. Although we've been kind or cutting up here a little bit, bringing it back to hone as to where we are and what this is all about, it's simply that. We intend to be ableto provide—

THE COURT: Ms . Smale, let me ask you, if you would, ma'am, to step down and go in the jury room for a second and let me take care of a law matter and we'll get you right back on the witness stand.

(Whereupon, Ms. Smale left the courtroom, after which the following proceedings were held.)

THE COURT: The Defendant needed some medicine.

(Whereupon, Ms. Smale returned to the courtroom [1260] and the following proceedings were held.

THE COURT: Go ahead, Mr. Macaluso.

Q Back to what I was saying, the reality of the situation is—I don't need to tell you that it is a very serious situation that requires certainly the utmost concern of every one who would be a prospective juror in this type of case.

Strong feelings, of course, enter into this type of situation, to a large degree the penalties and the nature of the offense. You were asked this question, number fifty-six, how you feel about the death penalty and Lord knows you were given precious little time to really reflect on that. You've had overnight, so let me just ask you if you would share with us—because we're all interested, of course. Could you share with us in your own words how you feel about the death penalty and capital punishment basically and generally speaking and then your ability to actually serve on this type of jury or your inability to serve, if you feel you cannot?

[1282] will only receive the first two questions in which case you answer those. Two yes answers it's death mandatorially. That question basically asked you whether or not when he killed him was he provoked to kill him. If you find that there was no provocation, of course, you answer the question yes. If you find that there was something that the victim did or said to provoke someone into killing him, even though it's not a defense, you decide whether it was reasonable or unreasonable for the Defendant to kill this individual. If you find that it was unreasonable, you answer the question yes. If you find that it was reasonable, you answer it no. That's a confusing sort of question; isn't it?

A Well, the way it is stated, but I assume what you're saying is, was the killing by the Defendant based on just cause by an act of the deceased.

Q Right. In any case, you can see how these question can be answered yes or no depending on the evidence?

A Right.

Q Let's shift our gears for just a [1283] second and go back to something we talked about earlier and that's a situation where you would be called upon to consider the range of penalty for the offense of murder. Remember that I said regular murder? I'm not suggesting, Ms. Smale, that this would ever occur in this case or any particular case, but it's something like the other things we've been talking about. We have to discuss it.

Let's say for example, Ms. Smale, you're on a hypothetical jury. It's a capital murder indictment, but it alleged that it is a murder during a burglary which is a type of capital murder, murder plus burglary. Let's say you don't have a single doubt whatsoever nor do the other jurors that the Defendant committee murder. You didn't hear any testimony about any burglary or you have a reasonable doubt about whether it was done during a burglary. Do you understand that for us to expect you to convict someone of capital murder, we have to prove both the murder and the burglary and we didn't do that,did we?

A You said you didn't.

Q Okay. In which case, you couldn't [1284] find him guilty of capital murder. You would find him not guilty of capital murder because we didn't prove capital murder. You found him guilty of what we proved which is what? Murder. All that does is change the range of penalty back. It is no longer mandatory life or death. Instead it's that range of penalty we talked about earlier. It's as broad as any range for any offense under the laws of this state. Broad, I think, because the legislature had in mind what we all know and that

is, one person can kill another. In other words, commit murder under a myriad, and infinite number, of facts and situations. The law allows a juror, a jury as a whole, to take into consideration all of the important surrounding facts and circumstances in deciding what the proper penalty ought to be. It's kind of like tailoring the punishment to fit the crime. It's a cliché, but it's true. That's what the law expects you to do.

Now, I know you haven't heard any testimony at all on which to base a decision, have you?

A No.

[1285] Q And that's what the law says. The law expects you, to be a qualified juror on a murder case, to number one tell us that you can follow the law in regard to what the range of penalty is. Secondly, that you will keep a completely open mind and wait until you've heard something on which you can base a decision and that is the facts, rights?

A Right.

Q If you hear a fat situation to your way of thinking that calls for and warrants and basically justifies a particular number of years, that's what you will give after you've heard the evidence. Fair enough?

A All right. I think that's what is on the questionnaire.

Q In other words, even though you can't consider—or let's say conjure up in your mind now a fact situation that calls for the maximum or a fact situation that calls for the minimum, you're open-minded. You're open-minded, aren't you?

A Yes.

Q You haven't heard any evidence and you will just tell us that you will wait and [1286] listen and if you hear a fact situation that, to your way of thinking, is proper and calls for and justifies the minimum and the minimum is five yearsm you'll give five years if you feel that's what is called for. Can you do that?

A Yes.

Q If you hear a fact situation that calls for the maximum, ninety-nine years or life, and you think that's the proper thing to do, you would actually vote for ninety-nine years or life and even add on the $10,000.00 fine, which is an option. Can you do that?

A Yes.

Q Bear in mind that doesn't mean that you have to sit there and think of a fact situation or you're being committee to anything. All you're saying is, I know what the law is and I'll follow the law whatever that is. I will wait until I hear the facts and I will do what is proper once I've heard the facts.

A That's right.

Q Any proplem with that at all?

A No.

[1369] RONNIE LONG, called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. NELSON:

Q Good morning, Mr. Long. As I was introduced to you on Monday, my name is Jim Nelson. Sitting next to me is Mr. Paul Macaluso. There is one more gentleman who will be involved in this trial when we start the evidence and that is a man by the name of Norman Kinne.. Mr. Kinne is about fifty years old and he is home with the chicken pox and has been for a few days and probably will continue to be for a few more.

The three of us, Mr. Kinne, Mr. Macaluso and myself, are assistant district attorneys assigned by your elected district attorney, Henry Wade, to handle this case for the State of Texas.

Immediately to my left is Mr. E. Brice Cunningham.

MR. CUNNINGHAM: Good

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[1372] in—I feel like it it only fair that we tell you our position in this caase. The State of Texas, meaning Mr. Kinne, Mr. Macaluso and myself, is actively seeking the death penalty in this case for Thomas Joe Miller-El. We anticipate that we will be able to present to a jury the quantity and type of evidence necessary to convict him of capital murder and the quantity anf type of evidence sufficient to allow a jury to answer these three questions over here in the affirmative. A yes answer to each of those questions results in an automatic death penalty from Judge McDowell. We'll talk more about that in a few minutes, but that's our position.

You had a chance on Monday to fill out a questionnaire and one of the question on there was your feelings about the death penalty. I would guess that was kind of surprise, that this whole thing was kind of sprung on you on Monday without much warning and you didn't have a whole lot of time to think about your feelings about things. You've had a couple of days now, a couple of nights to sleep on it. w uld you tell us again in your [1373] own words how you feel about the death penalty in tine State of Texas?

A Do you mean whether I'm for or against it?

Q Are you for or against it and do you feel it serves a purpose in our society?

A I do feel it serve a purpose as a deterrent toward crime.

MR. WEST: T can barely hear you, sir.

A I do feel that it is a deterrent toward criminal activities.

Q Mr. Long, is this something that you had thought about before Monday?

A Yes.

Q Is this a belief that you have held for quite a period of time?

A Yes.

Q Okay. I see you're married; is that right?

A Correct.

Q Would you venture a guess as to how your wife feels about the death penalty?

A I really haven't thought much about that.; but I would not think she would be

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[1390] burden of proof on proving the case in the first place; the capital murder offense?

A Right.

Q Okay. Mr. Long; I want to talk toyou about one other thing that we don't anticipate will come up in this case, but it is always a. possibility. That is—let me take a different situation. Let's assume we have a murder that we have charged, a murder being committed in the course of a burglary. That would be a capital murder charge according to the lawn in the State of Texas; right?

A Right.

Q Let's assume that we proved to you that the Defendant knowingly or intentionally caused the death of another individual, but we don't bring you any evidence whatsoever of a burglary. Now: we haven't proved capital murder then at that point, have we?

A No; sir.

Q All we have proved is murder?

A Right.

Q If all we prove is murder, the death penalty is no longer an option in that[1391] particular case. The range of punishment changies drastically. The range of punishment for under is any where from five years up to -ninety-nine years or life and a fine of up to $10,000.00. That's the widest range of punishment for any offense under Texas laws. Would you

agree with me, Mr. Long, that there are just a myriad of circumstances under which a murder can be committed, all kinds of factors that could come into it and be surrounding circumstances in the killing of another human being?

A Yes, sir.

Q Okay. Now, I want you to be clear about one thing. We aren't talking about self-defense, then the person is not guilty of murder. If the jury finds that it is an accident, the person is not guilty of murder. If the jury finds it is a killing under the heat of passion, he's not guilty of murder. He's guilty of voluntary manslaughter. Those are all different. What we're talking about is knowingly or intentionally taking the life of another human being without any legal justification or [1392] excuse. Other factors can come in from all over the place. All kinds of other circumstances can enter into it, but no legal justification or excuse. Are you with me so far?

A Yes.

Q In order for you to be qualified to serve as a juror on this case, you have to tell me, Mr. Macaluso, the lawyers for the defense, and the Judge that you can consider the entire range of punishment for the offense of. Murder. Now, when I say consider; I don't mean you have to be able to tell us right now I'll give five years. You don't have tobe able to tell us right now that you would give life because you haven't heard any of the facts in this case and obviously you can't make a decision until you've heard all of th evidence you're going to hear. Would you agree with me on that?

A I do.

Q What we're asking is, if you feel, after haring all the evidence, that the person is guilty of murder, if the facts and circumstances justify it and call for it in [1393] your mind, could you assess a ninety-nine year or a life sentence for the offense of murder?

A Yes.

Q Let's go to the other end. If after you've heard all of the evidence and you found the man guilty of knowingly or

intentionally causing the death of another individual without any legal excuse or justification—you've now heard all the evidence you're going to hear on the guilt or innocence and on punishment—if you feel, after hearing all of that, that the facts and circumstances Justified and called for; In your rind, a five year sentence, could you consider and give a five year sentence for the offense of murder?

A Yes, sir.

Q If the facts and circumstances justified it after you heard all of the evidence; is that right?

A Yes.

0 So all we're asking you to do is keep an open mind as to the entire range of punishment until you've heard all of the evidence. Do you feel like you could do that?

[1394] A Yes. sir.

Q Okay. Now, we don't have to prove to you, Mr. Long, in either phase motive or premeditation. I think the Judge told you that the other day. Those are not issues in a murder case in the State of Texas. You hear about them on TV a lot. I guess maybe they're issues in California, but they aren't here. We don't have to prove why the killing happened, although we may. It's not a burden. We don't have to prove to you a motive. We don't have to prove to you that it was premeditated. Do you have any problem with that?

A No, sir.

Q The law also allows us to prove a case with a single eyewitness. Would you agree with me that there are cases like that, a purse-snatching or a rape, where there may only be the person that did it and the victim of the crime there at the time?

A Yes, sir.

Q That's why the law allows us to prove a case with only one eyewitness. If you believe that eyewitness beyond a reasonable doubt as to each element of the offense, you're

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[1437] LINDA M. BERK,

Called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows"

EXAMINATION

By MR. MACLUSO:

Q. Ms. Berk, let me begin by reintroducing every one here. I'm Paul Macaluso. This is Jim Nelson and when the trial itself begin, you will be introduced to a gentlemen by the name of Norman Kinne. He's not here because he has, of al things the chicken pox.

A. Sounds like he teaches first grade.

Q. He's about fifty years old, too, and we're giving him a lot of ribbing. He will actually be presenting the evidence to the jury once the trial itself begin. We are all three assistant criminal district attorneys here in Dallas. We work for Henry Wade who is the district attorney, as I'm sure you know. We've been designated as the lawyers to represent the State.

* * * *

[1441] one and you're not there to—if you just tell us exactly and precisely how you feel as honesty as you can tell that's all that that's all any once ask and you'll be doing you r job as I said earlier, Now, if you have a question about anything, then by all means ask it. If you have something that you would like to tell us, chime in at anytime because your opinion, really—I'm not trying to patronize you. Your opinion is the most important opinion here right now. They've all heard me speaking for a couple of weeks. They know me. They don't need to hear from me. They need to know how you feel.

Now, let me tell you exactly what our position is, Ms. Berk, with regards to this case. You know that Thomas Joe Miller-El is charged with capital murder. From what you may recall the judge saying on Monday, you know that a person who is convicted of capital murder can receive only on of two possible penalties. One is a sentence of death, which is carried out by the execution of an individual through the injection of a lethal substance. The other sentence is life. There [1442] is no in between for a person convicted of capital murder.

I don't mean to be unnecessarily graphic about this, but I think it is only fair that you and any other juror we talk to—to let you know exactly what the stakes are and to acquaint you and familiarize you as much as we can with what really is going on here.

Let me start by saying this: The State of Texas, that is, Mr. Kinne, Mr. Nelson and myself on behalf of Dallas County are actively seeking the death penalty for Thomas Joe Miller-El in this case. We make no bones about it. That's our position based on the law and based on the evidence. We intend to provide a jury in this case, once it is selected, with the type and quality of evidence that will convince them beyond any reasonable doubt whatsoever in the first part of the trial that Mr. Miller-El is guilty exactly as he's been indicted of the offense of capital murder.

Then in the second part of the trial, we intend to be able to provide a jury, once it is selected, with the type and qualify [1443] of evidence that would convince them beyond any reasonable doubt that the questions that will be submitted to the jury should be answered in each case yes which, as you may recall from what the judge said yesterday, would require the judge then to assess mandatorially a sentence of death by lethal injection. Do you see what I'm getting at?

The reason I say this is, I've read your questionnaire and I've got kind of a handle on how you feel about things. We'll discuss some things in just a minute, but I want you to understand, what I think you allready know, clearly and that is, this is not something that you're reading about. It's not something you're discussing over coffee with friends when you're debating over whether it may be. You are in the thick of it, so to speak. Because we have this opportunity now to talk to prospective jurors like yourself, we get to find out whether or not just qualified generally for jury duty, but whether or not they're suited for this type of case.

I know I'm running on here, but [1444] we've talked to twenty-six people in this case in preparation for this jury selection and we have two jurors so far and one is kind of iffy because of a medical problem. If you just look at the arithmetically, it's very very small percentage of the people that we talk to that are ultimately both qualified and suited for service on a capital case. I think you know why. You know why, don't you? So what we need to do is see how you feel and see whether or not you're qualified. I'm sure generally speaking you're probably qualified for most any type of jury service, but you may not be suited for this type of service. Like I said earlier, arithmetically so far, if you go on the basis or the number we've talked to and the number of jurors we have, one in thirteen of you. That doesn't make the twelve other ones who are not going to serve on this jury bad citizens or anything like that. Do you understand that, of course?

A Yes, sir.

Q There's no doubt about that. It just means for one reason or another they simply were not suited or qualified for this [1445] type of jury service. That's what we're about here and that's what we need to talk to you about.

Now, I notice on your questionnaire with regard to question number fifty-six where you were asked how you feel about the death penalty. I sense, at least, just from the way

you're kind of fidgeting up there, you've got some real strong feeling about this?

A. I came to grips with that yesterday.

Q. Tell us, if you would, in your own words how do you feel about the death penalty and then, secondly, your ability, in all honesty, or inability to actually serve on a of case of this type and actually render a decision that would result in the execution of another citizen?

A You're going to have to excuse me because I'm getting a little emotional, okay?

Q. There's no need—okay.

A. I know, but you see I have never come to grips with this before. I remember especially during the Manson trial—I lived

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[1480] DOMINICK DESINISE,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. NELSON:

Q Good afternoon, Mr. Desinise. As I was introduced to you on Monday, my name is Jim Nelson and sitting next to me again is Mr. Paul Macaluso. As the trial moves onto the stage where we actually present evidence another man will be joining us and his name is Norman Kinne. Mr. Kinne, who is about fifty years old, is home with the chicken pox and has been for a few days and I guess will continue to be for a few more. The three of us are assistant district attorneys in Dallas. We've been assigned by Mr. Henry Wade, your elected district attorney, to handle this case for the State of Texas.

Sitting to my immediate left is Mr. E. Brice Cunningham.

MR. CUNNINGHAM: How are you this afternoon?

* * * *

[1483] that is, there are some difficult issues and not everybody is suited to serve on this type of jury. That's what we're trying to find out, is whether you're the kind of person that is not only qualified, but suited to serve on his type of jury.

I feel like you have a right to know right up front what our position is. Mr. Kinne, Mr. Macaluso and myself, representing the people of Dallas County and the state of Texas, are actively seeking the death penalty for Thomas Joe Miller-El. We feel like we will be able to present to a jury and to you, if you're on that jury, sufficient type and quantity of evidence to convince you that he is guilty of capital murder and the sufficient type and quantity of evidence to convince you that the three questions there on those boards should be answered yes, the result of that being the death penalty. If each of those questions is answered yes, Judge McDowell has no option whatsoever but to assess the death penalty.

We do that with the anticipation that, when the death penalty is assessed, at [1484] some point Mr. Thomas Joe Miller-El—the man sitting right down there—will be taken to Huntsville and will be put on death row and at some point taken to the death house and placed on a gurney and injected with a lethal substance until he is dead as a result of the proceedings that we have in this court on this case. So that's basically out position going into this thing. I think it is only fair that you know that. That's all the introductory type of talk I'm going to do.

You had a chance on Monday to fill a questionnaire and on of the questions on there, number fifty-six, asked you your feelings about the death penalty. You put that you do not believe in the death penalty.

A. I did.

Q. Can you kind of put in your own words your feelings about the death penalty?

A. We're all big guys. We all talk, yes, if somebody did something, we're going to do out and we're going to kill them, but when you make up your own mind, even though I'm a Vietnam vet and I was not in a combat zone, I was in construction with the engineers, I've seen

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[1519] JOE A. WARREN,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Thank you, Your Honor, and good afternoon, Mr. Warren. Mr. Warren, let me begin by reintroducing everyone to you. I'm Paul Macaluso. This is Jim Nelson.

MR NELSON: Good afternoon.

Q. When the trail begins, we will be joined by Norman Kinne. Mr. Kinne, along with the rest of us here, are assistant criminal district attorneys here is Dallas. We work for Henry Wade who, I'm sure you know, is the district attorney for Dallas and Mr. Wade has designated us to represent the State of Texas. Mr. Kinne, to our surprise, contracted the Chicken Pox. He's about fifty years old, so we're kind of ribbing him about it. I guess it's not really funny that he came down with it because he's got the Chicken Pox and we'll probably join him in the next couple of weeks.

[1520] To Jim's immediate left is Mr. Brice Cunningham.

MR. CUNNINGHAM: How are you, Mr. Warren?

Q. To Mr. Cunningham's immediate left is Mr. Royce West.

MR. WEST: Mr. Warren, good afternoon.

Q. You may recall that they are the defense attorneys who have been appointed by His Honor, Judge McDowell to represent the Defendant who is charged with capital murder. His name is Thomas Joe Miller-E. He's in the powder blue suit and you may be able to see him from where you're sitting, He's charged with capital murder.

The reason I've taken time to reintroduce everyone here is to reacquaint you with the roles we play, who we are and what we do, and simply to ask you if you recognize any one of us, Mr. Warren, other than from the other day?

A. No. I've probably seen each of you.

[1521] Q. Going down the halls or something like that?

A. Yes.

Q. You don't know anything about this case, do you?

A. Not that I can recall.

Q. As you well know, Mr. Warren, you are a prospective juror in this case. We have two jurors, but on is kind of iffy because they may have a medical problem. Basically We have two jurors, but we need ten more before we can start. We've talked to—you're the twenty-eighth person that has been assigned to service in this case and we only have two jurors, so you can see how laborious and time-consuming this is.

Now, the whole purpose of this process we're going through is to ultimately try to find the twelve people that both sides feel are best suited and best qualified for this type of very serious case. You know that Defendant is charged with capital murder. That's the most serious level of all crimes under the laws of this state. It's obviously serious because of the nature of the offense.

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[1527] he went ahead and killed anyway; is that right?

A. Yes.

Q. I gather you feel very strongly about human life, I gather , in that regard?

A. Sure.

Q. We're talking about murder?

A. Yes.

Q. What sort of crimes, if you can think of any—and if you can't, that's fine, but just let me know. What sort of crimes do you feel it would not be warranted? You said some cases yes and some cases no. Are you saying, if he didn't have a choice, you don't think the death penalty is warranted?

A. I would say in some case, if you were—in self-defense sometimes, then I would say no.

Q. Let me talk a little bit about murder and capital murder. First off, you can only receive the death penalty in Texas for the offense of capital murder. It's a very, very special type of murder. Years ago you could get the death penalty for rape and you could get the death penalty for armed robbery and some other offenses, I think. But under the [1528] law that is in effect in Texas today, the only offense that can receive or potentially receive the death penalty for is a capital murder.

Capital murder starts off basically with what we know as the offense of murder. I'll call it regular murder even though that law doesn't agree with that. It just calls it murder. Murder is a situation where one person knowingly or intentionally causes the death of another individual without any legal excuse or any legal justification. Murder, as I've described it, is not a capital offense. It is not an offense for which a person, under the laws of Texas, can receive the death penalty.

For example, if I knowingly and intentionally cause the death of Mr. Nelson without any legal excuse or justification, that may be murder. Unless it's committed under certain circumstances or Nelson is a particular class of individual like a fireman or a police officer, then all it is—I shouldn't say all it is because it's obviously very serious. It is not capital murder. Am I making myself clear?

[1529] A. Yes.

Q. All right. You can't receive the death penalty for that type of a murder. On the other hand, if you commit murder, knowingly or intentionally causing the death of somebody and you murder somebody who is a policeman or a fireman or a jail guard, and those people are acting in the lawful discharge of their duties—their on the job, in other words—and they're killed, then murder is elevated, raised up to the level of capital murder and you can receive potentially the death penalty for that. Do you see what I'm getting at?

A Yes.

Q. Some other types of capital murder would be murder of a bunch of people, mass murders. That's new under the law. Do you remember when there were six or seven people killed in a bar about two years ago?

A. Yes.

Q. That could be a capital murder under the law. Or if you kill somebody of hire, if I hired Mr. Nelson to kill Mr. Cunningham, I could he tried for capital murder for hiring him and be could be tried for doing [1530] the actual killing. Both of use could get the death penalty for hiring yourself out as a killer. Or, as we've alleged here in this indictment, if you commit murder while you're either attempting to commit or are actually committing another felony offense. If you murder someone while you're robbing them, if you murder somebody while you're burglarizing somebody's home, if you murder somebody by arson or you kidnap somebody that you murder. Do you see what I'm getting at?

A. Yes, sir.

Q. We call that murder plus. Right off it's a murder plus another very serious felony offense. How do you feel about this Do you feel those are the types of cases, generally speaking, where you feel the death penalty would be appropriate, depending on the facts and circumstances?

A. Well, there again, I would say it depends on the case and the circumstances involved at the time.

Q. Okay. But depending upon those things that you mentioned earlier, do you feel, for example, a murder during a robbery where a [1531] person had a choice to kill or not to kill? Do you see? Do you feel that would be the type of case that you feel the death penalty would be warranted in?

A. I think if you hand a choice, you know.

Q. Now, let me ask you: Have you ever felt differently about the death penalty at all? Have you ever felt it wasn't the thing the to do or it wasn't—we didn't need it or we shouldn't have it?

A Well, there again, it goes back to the situation, you know, sometimes.

Q. You know, some people have just a general disapproval of the death penalty. I know some people go down to Austin to lobby against it and I have it repealed. You never were like that, I guess?

A. No. I've never—you know, just as far as generally speaking, I've never.

Q. You feel it's proper on a case-by-vase basis; is that right?

A. That's the way I look at it, depending on the individual case.

Q. Let me ask you: Do you see it [1531] serving a particular purpose in our society? Do you think it accomplishes anything in particular?

A. Yes and no. Sometimes I think it does and sometimes I think it don't. Sometimes you have to mixed feelings about things like that.

Q. What do you think it accomplishes when you feel it does?

A. I don't know. It's really hard to say because I know sometimes you feel that it might help to deter crime and then you feel that the person is not really suffering. You're taking the suffering away from him. So it's like I said, sometimes you have a mixed feelings about whether or not this is punishment or, you know, you're relieving personal punishment.

Q. In other words, you feel under certain circumstances the death penalty would be bad, but being locked up in a cage would be a whole lot worse and be more punishment; is that what you're saying?

A. Yes. In some cases you feel like maybe if the person were to suffer in some other way maybe. Maybe I'm not being specific, [1533] but sometimes, you know, you feel maybe this is not really punishing the person to give him to death penalty.

Q. It's over?

A. Yes, it's over and, you know, they're not really suffering from it.

Q. Let me ask you this: You're a married man, aren't you?

A. Yes, sir.

Q. Do you know or would you hazard a guess how your wife feels about the death penalty?

A. No, I don't because we've never really disscussed it.

Q. It's not something that everyone sits down and hashes out, but sometimes people know or have a feeling. If you had to hazard a guess, if you guessed, what do you think her feelings would be?

A. Well, if I had to guess, I would say probably it would depend on the situation.

Q. You've got three children; is that right sir?

A. Yes, I have

Q. On of them is grown, though. [1534] Almost all of them are grown, aren't they?

A. I have one still in high school.

Q. Let's talk a little bit about the procedure in a capital murder case. You understand that under the old laws when a capital murder case was tried, the jury decided in the first part, of course, as they do today, whether the person is guilty or not quality based on the evidence. If the State proves the indictment to the jury and the jurors has taken an oath to a true verdict render according to the law and according to the evidence, it would mean simply this: If they proved the case to you that the man is guilty, you find him guilty. Can you do that?

A. Yes.

Q. And if we didn't prove it to you, obviously, if you had a reasonable doubt about one of the accusations, you would find him not quality. Could you do that as well?

A. Yes

Q. Just call it the way you see it. That's all that would be expected. How, in the second part of the trail under the old law, the jury might hear more evidence and they might [1535] not. They might just learn about what happened in the offense itself. Under the old law, after you heard all of the evidence, the jurors would decide directly whether a person should receive the death penalty or a life sentence or some number of years. If you someone ought to die for what you heard and the others agree to it, that's what he got, or life or whatever it was, if the jury unanimously agreed. Could you do that if you were called upon to do that? Could you make that decision?

A. I think I could.

Q. Okay. How, that's kind of a trick question because the law doesn't allow you to do that any longer, directly. You don't decide directly whether someone should die or get a life sentence or a number of years. In fact, you can't even consider a number of years. Instead, they give you at the end of the trial—after you've heard all the evidence, the Judge

will give you two or three questions to answer based on the evidence and the State has the burden of proof that the questions should be answered yes. If they prove they should be answered yes, you answer [1536] them yes. Just like you would have to find the man guilty in the first part, you answer the questions yes if we prove that they should be answered to you in the second part. Any problem with that at all?

A. No.

Q. If we don't, then you, as a juror, are required to answer the question no. Could you do that, as well?

A. Yes.

Q. Do you understand the effects? All yes answers, that's the same as if you had written in the death because the Judge—if you write yes, yes, yes, the Judge will automatically, under the law, assess a sentence of death to the Defendant. He can't say, "No, I don't agree with that. I'll give him a life sentence." You see, it's automatic. You're not writing death, but three yes answers equal death. Make no mistake about it. Could you do that?

A. Yes, I could.

Q. All right. The same thing, one or more no answers equals a life sentence. Whether the Judge agree with you or disagrees [1537] with you, you'll never know anyway because he's not going to say that, what his feelings are. With all due respect to the Court, he's not in a position to tell you whether he agrees or disagrees. Now, you said you could that, as well?

A Yes.

Q. All right. Let's look at the three questions. Take whatever time you need to read those, Mr. Warren, and we'll talk to you about them in a little bit more detail.

A. (Juror complies.)

Q. Any questions about those at all?

A. No.

Q. The first one, I think, is pretty much self-explanatory. It asks you whether the Defendant acted deliberately with the

reasonable expectation that the victim would die. You say you could answer that question yes or no once you hear the facts of the case?

A. Yes.

Q. If you hear facts that convince you he acted deliberately, if you hear facts that convince you that he acted with the reasonable expectation that someone would die, [1538] you answer the question yes. If you don't, you answer the question no. Any problems with that?

A. No.

Q. How about number two? What do you think is being asked there, Mr. Warren?

A. In my opinion, I'm being asked would this person be a treat to society later.

Q. The key word there is probability. What do you think that words means to you in that context?

A. Maybe a chance or something like this.

Q. Is there a chance that the Defendant would commit—it doesn't say a particular offense, does it?

A. No.

Q. It doesn't say another murder, another capital murder, rape, robbery, burglary or an assault. It says criminal acts of violence. That may be self-defining. It may mean what it says it means, an act of violence. Is there a chance he will commit an act of violence, a crime, in the future? Do up necessarily agree with that?

A. I suppose there's always that [1539] chance, but there again, you never know.

Q. Well, do you think that question can be answered yes or no? Would you be able to answer that question yes or no depending upon the evidence you hear?

A. Based on the evidence, I would answer it accordingly.

Q. Let me ask you this, Mr Warren: Could you share with us what you feel would be the most valuable to you the permit you to answer that question yes? What would you want to know about somebody to decide whether or not this is

a type of person, you know, that you would feel good about answering the question yes, "Yeah, I think there is a chance that this guy is going to commit some crimianl act of violence in the future."? What would you want to know about?

A. What would I want to know?

Q. Yes. I'm putting you on the spot, aren't I?

A. That's really hard to say, as far as being specific, what I would like to know. I guess probably I would have to know some of the background of the person, maybe something [1540] that happened in the past or something like this.

Q. Criminal background, had he done something like this before?

A. Something like this in the past, you know.

Q. That he's done some other violent acts in the past?

A. Yes.

Q. Let me ask you: Do you think you could learn enough when you learn about what he did during the offense itself? For example, you learn about the crime itself, the capital murder itself, what he did, for example, before, during and after, like did he plan it, did he participate in the planning, pick out the victim, the location. How about the crime itself, did he actively participate in it or was he the get-away driver? Do you see? Was he a leader or was he a follower? Was he calling the shots or just standing by? Did he have—like you said earlier, did he have to do what he did? Was it necessary what he kill this individual? Do you see what I'm getting at?

A. Yes.

[1541] Q. Okay. Then afterwards, you decide whether or not—how did he react to the whole thing? After killing this individual, if he did was he feeling bad about it, crying unhappy about it, or was he nonchalant, was he blaze, another day at the office, he just didn't care. If you learn all about the offense itself, do you think you could learn enough about a person if you learn all about what he did before, during and

after a crime, would it satisfy you that, "Yeah, there's a chance that this guy will probably do something like this again given the chance"? Do you think you could do that?

A. Sure, there's a possibility.

Q. The last question just asks basically whether or not it was an offense that involves some provocation. In other words, did the victim do or say something to provoke the Defendant into killing him. If you decide that he didn't do anything, then you answer the question yes, it was a unprovoked death. If you decide he did or said something, then you decide whether or not the Defendant acted [1542] reasonably or unreasonably in killing him. Do you see what I'm getting at?

A. Yes.

Q. Let's shift gear for just a second, Mr. Warren, and talk about what we started talking about intially and that's the offense of murder. Let me make sure you understand what murder is and what murder is not, okay?

A. Yes.

Q. Because you mentioned something earlier about self-defense. Let me talk to you about the offense of murder. Let me set the ground work. You could be on a capital murder jury. Just imagine fro it for a second. We're not talking about this case or anything like that, just another case, imaginary case. Let's say it was a murder during a burglary. Let's suppose for just a minute that you hear evidence that satisfies you and convinces you beyond a doubt that the Defendant murdered this individual, but let's say you didn't hear any evidence about a burglary. Do you see? If we want to convict the Defendant of capital murder, we have prove both the murder and [1543] the burglary. Do you see what I'm getting at? We didn't do that, though, did we? We only proved the murder, so you can't find the Defendant guilty of capital murder if we didn't prove the burglary. You found him not quilty of capital murder and found him quilty of murder, which is what we did prove. Am I making myself clear?

A. Are you saying, if you proved the murder and not the burglary, it's not capital murder?

Q. That's exactly what I'm saying. In order for that to happen—lets' say that happened. Then the only thing about automatic life or automatic death—remember, as I said earlier, you can't get the death penalty or an automatic life sentence just for murder. Do you understand that?

A. Yes.

Q. Okay. I gather you feel pretty stongly about murder, do you not? I mean, it goes without saying?

A. Well, It's just like I said, you know. There are cases, I mean, personally, that I feel I wouldn't want to personally be, [1544] you know, involved with it if I had a choice, but as far as the case, you know, if I feel that you can avoid it, you know, I think you should

Q. All right. So let's talk—you said earlier that one of the biggest factors in your decision would be whether or not a person, like you said, had to do it or had another choice; is that correct?

A. Yes.

Q. Okay. Now, when we talk about murder, we talk about a situation where one person knowingly and/or intentionally causes the death of another human being without any legal excuse or any legal justification. Let's talk about what a legal excuse or legal justification is. One of them was mentioned earlier. It's self-defense. You, me, Mr. Nelson and everyone here had the right to kill somebody, if it's necessary, in self-defense. If we do that, even though we might be charged with murder—if you were charged with murder and I was on the jury and I believed that you acted in self-defense, I would have to find you not guilty. It's not that I would give you [1545] a low punishment, but if I understood and believed that you acted in self-defense, I would have to find me not quilty, if things were switched around. Do you see what I'm getting at?

A. Yes.

Q. So when you're thinking about the punishment for murder, the range of punishment for murder under the law—and we'll talk about that in a second—don't be thinking about self-defense because if you think somebody killed in self-defense, then you have to find them not guilty. They're not guilty of murder, so don't be thinking about self-defense.

Another justification would be, or another situation is, if you kill somebody accidentally. Even though you've been charged with murder, if I believe that you killed somebody accidentally, the gun went off by accident, the gun or a knife, whatever the case may be, I would have to find you not guilty. It's not like you say, "Let's give him some light punishment or give him probation or [1546] something like that." It's not guilty because that's no murder. If you believe that I was insane, ever though you might not like the insanity defense because a lot of people don't if you honestly believe that I was insane when I killed somebody, it's not murder. Do you see what I'm getting at?

A. Yes

Q. The same thing holds true, lets say for a crime of passion, something that we all can understand. For example, you're a parent and let's say, God forbed, something should happened to one of or daughters. She's sexually molested, for example. You come home and you find out and you find out that the neighbor up the street is the one who did it and he's laughing about it and you go berserk, you know. You pick up a gun or a knife and you go up the street and you kill him. Do you see? That's not murder, either. If you believe that I did that, for example, because of what reaction I had to what this guy had done to my daughter, that's not murder. That's voluntary manslaughter. Do you see what I'm getting at?

A. Yes.

[1547] Q. It's not murder. If want you to divorce your thinking form accident, insanity, self-defense or a crime of passion or even a reckless act where I shouldn't have been

doing something because murder is a knowing and international act. I knew, when I killed Mr. Nelson, what I was doing and I intended to do it. Do you see what I'm getting at?

A. Yes.

Q. Now, the reason mention that is this: The law—as I said, there is a completely different range of penalties for offense of murder. I don't want you to be think about these other things where you might say that you would give a guy a break if it happened—if I thought he was insane or if I thought it happened in self-defense, any of those cases. You don't do that. You find them not guilty. What we're talking about, we're talking about murder, "I knew it." I intended to do it." "I killed somebody." There is no legal excuse or no legal justification.

Let me ask you: What do you personally feel ought to be the penalty? What do you think ought to be the minimum penalty [1548] for someone who knowingly and intends to kill somebody? What do you personally feel should be the minimum penalty for that sort of conduct?

A. Are you speaking without any provocation or anything, just—

Q. Right.

MR. CUNNINGHAM: Your Honor, we would object to ith out any provocation because provocation is not an element of the offense of murder.

MR. MACALUSO: I'll rephrase it, Your Honor.

THE COURT: Go ahead.

Q. When we say provocation, we mean something where I would be acting in self-defense if he provoked me. I'm talking about limiting it, so don't be thinking about self-defense, insanity, accident or a crime of passion, in the heat of passion. What do you think the minimum ought to be?

A. Well, if I have to just give you a flat answer without knowing the case itself—

Q Well, I cannot give you a fact [1549] situation and I'm not asking you what would you do if this happened and what would you do if this happened, what would you do if that happened. Let me ask you this: The range of penalty for murder is from five years in the Texas Department of Corrections all the way ninety-nine years or life and up to a $10,000.00 fine. The law simple says, to be a qualifed juror, if you can in all honesty, you have it set the punishment somewhere within there. If not, like you said earlier—in all honesty, if you cannon, if you don't think you could set a punishment within that range, then you need to let us know. In other words, if you saw a case that involved a murder—and I don't have time to go back and review those categories, but a murder where one person knows he's going to kill this individual and intends to kill the individual and kills him—what do you feel would ever be proper, under any facts and circumstances, to your way of thinking, to ever assess a penalty as low as five years in the penitentiary for a knowing and intentional killing?

MR. CUNNINGHAM: If he [1550] thought that was the proper punishment.

MR MACALUSE: Excuse me, Judge.

MR. CUNNINGHAM: Your Honor, if he felt that that was a proper punishment in that case.

THE COURT: Did you qualify it like that?

MR. MACALUSO: I believe I did. I think I said what he thought was proper based on the facts.

Q. In other words, could you ever vote for five years?

A. I would try to make my decision based on the case and the evidence at the time.

Q. Are you saying that you could?

A. I could, based on the evidence that was given at the time, yeah.

Q. All right. By the same token, I gather then, if you heard facts and circumstances that called for a sentence of ninety-nine years of life, if you felt that was the proper thing to do after you heard the [1551] evidence, you could do that?

A. Yes, if—I would make my decision after I heard the evidence. I wouldn't make the decision in advance.

Q. Let me ask you this, sir, in closeting here; If you had the choice of having the death penalty in Texas or not having the death penalty in Texas, how would you feel? Would you have one or not have one?

A. Well, you mean just a flat yes or no on the death penalty?

Q. Yes.

A. Well, I probably wouldn't vote yes or no because there are cases where I do believe it probably would be roper, but there area other case where I don't so—

Q. What I'm saying is, if you could tailor certain fact situation, do you feel that we should have the death penalty of certain types of cases?

A. In certain types of case, I do.

Q. Mr. Warren, I've done most of the talking here and given you time to respond, by let me ask you: Do you have any questions of us, at all?

[1552] A. Not at this time.

Q. Do you know of any reason, sire whether I've touched on it or not why you couldn't be a fair and impartial juror to both sides?

A. None whatsoever.

Q. Is there any reason why you couldn't answer all three of those questions yes. If we proved that they should be answered yes, knowing that it would result in this man's execution?

A. No.

Q. I appreciate your honesty, Mr. Warren, with us. Mr. Cunningh am and Mr. West will have some questions for you now.

MR. MACALUSO: I'll pass the witness—Juror, rather.

THE COURT: Thank you Mr. Cunningham.

[1553] EXAMINATION

BY MR. CUNNINGHAM:

Q. Mr. Warren, as you have been advised, my name is Brice Cunningham and, along with Mr. West to my left, we represent Mr. Thomas Joe Miller-El in this case where he stands charged with the offense of capital murder. Very briefly, I would like to ask you some questions concerning the questionnaire and possibly some questions that may have been propounded to you by Mr. Macaluso.

This first question my sound like it is asinine or a question that is obvious on the face, but there are some things that we have to get at indirectly. What is your races?

A. Black.

Q. I notice that you live as 4123 Telstar?

A. Yes.

Q. How long have you lived there, sir?

A. I've been there about eleven years now.

Q. Are you buying your home or renting you home?

[1554] A. Buying.

Q. You work at Kroger's as a market manger?

A. Yes.

Q. How long have you been with the Kroger's stores?

A. About twenty-one years.

Q. How long have you been market manager?

A. About nineteen and a half.

Q. Does your wife work outside of the home?

A. Yes, she does.

Q. In what capactity?

A. She's an operator. She operates a bagging machine.
Q. How long has she been employed?
A. About twenty years.
Q. You're a member of Salam Baptist Church?
A. Yes.
Q. How long have you been a member of Salem Baptist Church?
A. About twenty years.
Q. Your two sons, are they in high [1555] school?
A. One of them is, the youngest.
Q. Where is the oldest?
A. My oldest, he's at home, but he goes to a college here in town and works at night.
Q. Which one?
A. Mountainview.
Q. What year is he in at Mountainview?
A. He's in his second semester.
Q. How long were you in the army?
A. About three months.
Q. You're a member of Local 540 Union, meatcutters' union?
A. Yes, I am
Q. Have you held any offices in that union?
A. No.
Q. Is your brother still on the police force in New Jersey?
A. No, he's not.
Q. How long was he on the police force in New Jersey?
A. I'm not sure. He was up there, [1556] after he got out of the service, for about twelve years. I don't know exactly how long he was on the force.
Q. This mishap that your son was involved in, was that Bengy or Joe, Jr.?
A. That was Joe, Jr.
Q. Did anything happen as a result of that that might affect your decision if chosen as a juror in this case, sir?
A. No.

Q. That was something at school?
A. Yes, it was.
Q. You indicate that sometimes you see certain cases on TV and you're interested in it. You understand that anything you may have seen on TV would have no bearing whatsover on any issues in this case?
A. Yes, I do.
Q. And you could put that out of your mind?
A. Yes, I could.
Q. Was you brother-in-law a victim of a crime in Las Vegas?
A. My brother. Yes.
Q. Okay. What type of crime was it?
[1557] A. I don't know the details of it, sir. He had to make restitution of some money. It involved some food stamps or something, but I don't know all the details of it. He was convicted and got a probated sentence. He had to make restitution of some money.
Q. How long ago was that, sir?
A. That was about a year and a half or two ago.
Q. How long have you been a member of Crime Stoppers?
A. Well, the reason is, we have it in the neighborhood, you know, where we have—Is it called Crime Stoppers or Crime Watchers where, you know, you watch neighbors' homes? That may be Crime Watch, but it's the neighborhood service thing where the neighbors watch each other homes. That's what I'm speaking of. When Chief Dyson was here, we were also involved in the other program that he had that was similar to that. I can't recall the specific name of I, though. It was similar to that. They would have little meetings in the schools and PTAs and stuff like that. It was kind of a neighborhood thing is [1558] what it was.
Q. What part of the city if Telstar located in?
A. It's in Oak Cliff off of Westmoreland.

Q. Do you know of any reason, Mr. Warren, why you could not be a fair and impartial juror if chosen in this case?

A. None whatsoever.

MR. CUNNINGHAM: Pass the juror, Your Honor.

MR. MACALUSO: May we have have just a moment, Your Honor?

THE COURT: Surely. Mr. Warren, let me ask you to wait out in the hall for just a moment, please.

(Whereupon, Mr.Warren left the courtroom, after which the following proceedings were held.)

MR. MACALUSE: We will exercise a preemptory challenge.

THE COURT: Okay. Well, I'll—

[1559] MR. WEST: I didn't hear you. Excuse me, what was that, Judge?

MR. MACALUSO: I said we exercise a preemptory challenge.

THE COURT: Of course, I'll note that.

(Whereupon, Mr. Warren returned to the courtroom and the following proceedings were held.)

THE COURT: Mr. Warren, I'm going to excuse you from service in this case, which means you will be free to leave here and go about your business. I want to add to what I said earlier and thank you for you patience primarily with us and the system. You were down here Monday practically all day and you're down here late this afternoon. I not from some of these lawyers questions that they felt a great deal of respect for [1560] you, because I do, for your answers. You're the kind of juror to me, at least, that makes the whole system work. It's people like yourself who are willing to put up with the hassle of the system to do your duty as a citizen. I wish

you could serve as a juror on some cases, but evidently this not the case, so you will be excused to go about your business. Thanks a whole lot.

MR. MACALUSO: Thank you Mr. Warren.

MR. CUNNINGHAM: Thank you.

THE COURT: That take care of twenty-eight.

MR. MACALUSO: Twenty-nine.

MR. NELSON: Thirty.

MR. MACALUSO: Thirty-one and thirty-two.

(Whereupon, these proceedings are continued in Volume IV.)

* * * *

[1564] NOAD O. VICKERY,

called as a jury panel member, having been duly sworn by the court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. NELSON:

Q. Good morning, sir. I would like to start out by reintroducing everybody since it's been a couple of days. My name is Jim Nelson. Sitting next to me is Mr. Paul Macaluso. A third gentleman will be involved in this trial when we start the evidence. His name is Norman Kinne. Mr. Kinne is about fifty years old and is home with the chicken pox this week and will probably b there for a little while, I would imagine. I I didn't like it much hen I was seven years old and had them and I don't think I would like it now any more.

The three of us are assistant district attorneys here in Dallas and we've been assigned by your elected district attorney, Henry Wade, to handle this case for the State of Texas.

Seated immediately to my left is

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[1567] to go into some detail. I hope you will bear with me on that. Then I'm going to have to ask you some rather pointed questions for time to time. It's not because I'm nosy or I'm naturally curious. It will be some things that we need to know so that we can get the twelve people best suited to serve on this jury sitting in those chairs over there.

What that somewhat lengthy introduction, if you will bear with me, that's where we're headed in the next few minutes. I feel like it is only fair, Mr. Vickery, to tell you our position going into this case. We, Mr. Macaluso, Mr. Kinne and myself, represent the people of Dallas County and are actively seeking the death penalty for Thomas Joe Miller-El. We feel like we will be able to present to the persons on this jury sufficient type and quantity of evidence to convince them, number one, to convict Mr. Miller-El of capital murder and then in the second phase of the trial to convince you to answer those three questions yes. If those three questions are answered yes, the result is the death penalty. We'll talk more about that in a few minutes, [1568] but I feel like it is only fair for you to know going in what our position is. That's where we are and we're going to continue to seek the death penalty through out the trial with the expectation that we will be able to present to you that evidence and that man sitting right down there will be executed at some point as a result,

You had a chance on Monday, without having much time to give it thought, to fill out a questionnaire. One of the questions on that questionnaire was related to the death penalty. I know this was kind of sprung on you. Most people come down here expecting to be on a civil case or shoplifting or something and you walk in here and get a capital murder, it's a little bit different.

Now that you have had a couple of nights to sleep on it and a couple of days to think about it, would you tell us in your own wor(s your feel ings on the death penalty, whetner you feel it is proper or not, whether you feel like you could sit as a juror in this type of case?

A Well, sir, I've thought about it

* * * *

[1590] happened and the facts of the case, if we failed to prove one of those beyond a reasonable doubt, could you answer it no even knowing that it would result in a life sentence and not the death penalty?

A Yes,

Q So you would bane your verdict on the evidence?

A That's correct.

Q That's all we ask you to do. Wow, there was one thing that we don't anticipate will happen in this case, hut it might so we need to cover it with you. Do you remember that I told you earlier that capital murder in this case was murder plus another offense, If we fail to prove that second offense—if all we prove is that this Defendant knowingly or intentionally caused the death of another individual, but we don't prove it was in the course of committing robbery; then we haven't proved capital murder, we've just proved murder I think you remember that I said a few moments ago; the range of punishment for that is from five years up to ninety—nine years or life and a fine of up to $10,000.00. The death [1591] penalty is not an option in that case. Am I clear on that so far?

A Yes, sir.

Q If you are to be qualified to serve as a juror on this cane, you nave to be able to tell us that you can consider the entire range of punishment for the offense of murder if be is found guilty of simple murder, the killing of another individual without any legal justification or excuse whatsoever, no self—defense, no accident, no killing in the heat of passion or anything like that, knowingly or intentionally

killing another human being, Mr. Vickery, I'm just going to ask you, if, after hearing all the facts and circumstances, all of the evidence; you convicted a person of murder, if you feel that the facts and circumstances justified a sentence of Ninety-nine years or life, could you give that sentence?

A Yes, I could,

Q The other end of it is this: If, after you convicted a person of knowingly and intentionally killing another human being without any legal justification or excuse—[1592] would you agree with me that there are a number of circumstances that could enter into a killing? It might not be legal justification, but a number of surrounding facts and circumstances?

A I agree.

Q They could all have an effect on something like that. If, after hearing all the facts and circumstances of the case, you convicted the person of murder, if you felt like, based on the evidence, in your own mind, those facts and circumstances justified a five year sentence for the offense of murder, could you consider that and give that?

A Yes, I could.

Q So you're telling us you could consider the entire range of punishment for the offense of murder, the knowingly and intentionally killing of another human being; is that right?

A I feel like I could, yes.

Q. Obviously we can't tell you the facts of the case. We can't even give you any examples of what some facts might he. All you have to be able to tell us is, if you hear the [1593] case that justifies life, you will give life. If you hear the case that calls for five years in your mind, you will give five years and you will keep an open mind until you've heard all the evidence, I think you're telling us that you can do that; is that right?

A I certainly feel. that I can, yes.

Q Okay. Mr. Vickery, that's all that we ask. There is one other thing and that is, there may be certain circumstances in cases in Texas where there is only one eyewitness to a crime. For example, if you have a purse snatching or a rape, it could he the only two people there are the person that committed the crime and the victim of the crime, the person who was raped, The law allows the State of Texas to prove a case with only one eyewitness. If you believed that witness beyond a reasonable doubt as to every element of the offense; the law says that's enough and you're required to convict that person based on the testimony of one eyewitness. If you don't believe a person beyond a reasonable doubt as to anything in that indictment, you're required by the law to find him not guilty as in any

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[1601] your sister?

A That's correct.

Q "Info not know." What did you mean by that?

A It happened when she was—I was a teenager and she lived in Chicago and she was assaulted and put in the hospital. I know she came home—I was still living at home and she came home and stayed several months to recuperate. I don't know the details of that, T just know that she was assaulted.

Q That wouldn't affect your deliberations in this particular case, would it, or your ability to serve as a juror?

A I don't think so, no, sir.

Q You're saying no, it won't?

A No, it would not affect me,

Q Okay. You indicated also that your sister had been charged with, arrested, indicted and convicted of a criminal offense?

A That's correct,

Q What was that about and when was it? it?

A Again, I do not know the details. I know she was a arrested and served time in the [1602] penitentiary. It was in California. Again, I was a teenager and I do not know the details.

Q Because you were a teenager at the time?

A Yes,

Q Would that affect your ability to serve as a juror in this case?

A I don't think so, no,

Q You keep on saying "I don't think so". When you say I don't think so, you're saying that's no?

A No, it would not. I'm sorry.

Q You served on a criminal jury here in flallaq in 1976?

A I think it was '76, 7 didn't write it down, but it was about ten years ago.

Q Do you recall what type of case it was?

A It was a theft case.

Q How many people were on the jury?

A Twelve.

Q Were you able to reach a decision?

A Yes, we were.

Q And the jury accessed the punishment?

* * * *

GENE R. HINSON,

[1640] called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. NACALUSO:

Q Can you hear me all right?

A Yes.

Q I tend to let my voice drop and I can get rambling pretty fast, so if I do, slow ire down, all right?

A Yes.

Q Mr. Munson, let me begin by reintroducing every one here. My name is Paul Macaluso, This is Jim Nelson.

MR. NELSON: Good afternoon.

Q Another lawyer will be jointing us once the trial begins. His name is Norman Kinne, Mr. Kinne has the chicken pox. He's about fifty years old, too, so we've been ribbing him, you know, as kind of a late hlooi'er. We're the lawyers for the State and we're all assistant criminal district attorneys, as I'm sure you may recall from the

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[1645] not be suited because of their personal feelings about the death penalty. Do you see what I'm getting at?

A I understand.

Q That's why we have to go through this laborious and tedious and somewhat repetitious process to get to know somebody and know more about then and see if they're really suited for this type of case. In the final analysis, Mr. Hinson—well, let me just put it this way at the very outset so you will know exactly where the State stands with regard to the reality of this particular case and this particular Defendant,

We are actively seeking the death penalty in this case for Thomas Joe Miller—El, the man seated right over there. In other words, we know that the law does allow for the death penalty, legal execution. We intend to be able to provide a jury, once it is selected, with the type and the qualify of evidence that would convince them beyond any reasonable doubt, as the law requires, that Mr. Miller-El is guilty of the offense of capital murder just exactly as he is charged in this indictment.

[1646] Then in the second part of the -trial, we intend to be able to provide a jury, once it is selected, with the type and

the qualify of evidence that would convince them beyond any reasonable doubt that all the questions that will be submitted, the two or three questions, should be answered yes which, as you know, will result mandatorially, automatically, without any question or reservation, in the Judge sentencing Thomas Joe Miller—El to be executed by lethal injection down in Huntsvil]e, Texas.

The reason I go through that is, of course, to tell you in all fairness, as we've done every one else that we've talked to, exactly where we stand based on the evidence. Of course, ultimately it is up to the jury to decide based on the evidence and the law. We feel it is only fair to every one on notice as to where we stand.

Of course—as y'n well know, you're thirty—nine years old, You've been around long enough to know that there was a tine in this country when people were being assessed death sentences, but no one was being [1647] executed and there was perhaps a time when any juror could probably, in their minds, think, well, it's just not a real thing. We might sentence someone to die, but they haven't executed any one in ten, fifteen or twenty years in some states. That's not the way it is any longer. I think any one—in all fairness to them and the realization—should realize and expect that if the death sentence were returned in this case, Mr. Miller-El will be executed at some point in time under the law. As you know, that's by lethal injection here in Texas.

Now, with those remarks out of the way, let me just ask you—I know you were asked this question—and then we're going to let you talk a little bit. Like I said, they've heard enough of me. Question fifty-six asks you do you believe in the death penalty and you had precious little time to really think about it, I suppose, and express yourself: but you've had two or three days to sleep in it, I guess; and think about it and mull it over in your mind. Let me ask you to share with us in

your own words your feelings [1648] about the death penalty and your ability or your inability, because of your personal feelings, to actually serve on this type of a jury?

A Well; I believe I put on the form there that I didn't agree with it for both moral and religious reasons, Not that I've done any tedious investigation, but from what

I've—just from the media and what I've read on my own—

THE COURT: Excuse me just a minute.

(Whereupon, an off therecord discussion was held,)

THE COURT: That was Mr. Weaver, I wanted to explain to him what had happened. I'm sorry, Mr. Hinson, That was right in the middle of your explanation. Go ahead.

A Well; I was just explaining from a lot of the data that I've read and so forth, it hasn't proved to be that much of a deterrent anyway. Then not only because of that; but just my own personal beliefs in the matter.

* * * *

[1787] what he wanted to do at the time that he had the right to shuffle and he did that, Then I turned around and did it according to how the defense wanted it done, Now, Mr. Nelson and I talked about it and he had made some mention down in the jury room that I was intentionally doing something and then he backed up off of that. Now, he is bringing it in under the guise as though just because sixteen jurors and one position on the first shuffle are in the same position on the third shuffle that it wasn't done randomly or the shuttle wasn't done correctly.

Mr. CUNNINGHAM: Your Honor, the point is, what this is really all about is that jurors number one, two: three, four and eight and fifteen on the first list were all black, that when they went down and shuffled the first tine; the black jurors

were number [1788] nineteen, twenty-six, thirty-six; thirty-seven, thirty-eight and thirty-nine; that after the second shuffle those same six blacks are now one, two, three, four, seven and fourteen. That's what this is all about.

MR. NELSON: Judge, I'm going to object to bir. Cunningham telling the Court what this is all about. I voice the State's objections—the Court can tell from the procedure, and I would like the record to reflect, that I voiced my objection to this last array before I knew what it was. I voiced my objection to the shuffling down in the central jury room while it was going on and before I knew what order the jurors would come up here in.

MR. WEST: Judge; Mr. Nelson was standing right by me when I shuffled, Now, he cannot dictate the number of times that the

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[1796] EDWIN L. RAND;

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. NELSON:

Q. Mr. Rand, I'm sorry. We're having a little trouble getting organized this afternoon it seems to get going. I'm sorry to make you sit up there for a minute. I want to kind of reintroduce everybody. You heard us in front of the whole group earlier this morning. To begin; my name is Jin Nelson, Fitting next to me is Mr. Paul Macaluso. The third person that will be involved for the State of Texas is a gentleman by the name of Norman Kinne. Mr. Kinne is about fifty years old and is home with the Chicken Pox and has been for a couple of weeks. Raving had then as a child, I can sympathize with

him, I certainly wouldn't want to have then at fifty years old, but that's what he's dealing with. The three of us are assistant district attorneys and it will he our responsibility to [1797] handle this case for the State of Texas. We've been assigned to handle it by Henry Wade, your elected district attorney. Immediately to my left is Mr. B. Brice Cunningham.

MR. CUNNINGHAM: How are you, Mr. Rand?

Q And to his left is Mr. Royce West.

MR. WEST: Mr. Rand; good afternoon.

Q These two gentlemen have been appointed by Judge McDowell to defend Thomas Joe Miller-El. He's the man at the far end of the counsel table from me. You may be able to see him or you may not from your position there, Mr. Filler-El is charged with the offense of capital murder, That is the most serious offense in the State of Texas. Because of that—have you been on jury service before, Mr. Rand?

A No, I haven't.

Q Normally in jury service, you would be seated out in the gallery with the entire group: kind of like you were this morning; and question would be asked and some things would be discussed out there in front of [1798] the entire group rather than one on one or one on five like we're doing it here, The hope in, that because these issues are so serious and people have very strong feelings one way or the other on what's involved in this case, by you being in here individually, you will be able to feel that you can talk more openly and hopefully be a little bit more relaxed; at least as relaxed as you can be while you're up on the witness stand and we're out here, The big thing that we would like you to do is relax and remember, Mr. Rand; that there are no right or wrong answers to anything any of us are going to ask you today. We're just trying to find out how you feel. No one is going to argue with you or try to change your mind about anything, but we feel like you need to know what you're

dealing with and what's going to happen and, of course, we need to know how you feel about some things, so we can get the twelve people best suited to serve on this jury sitting in those twelve chairs over there.

Now, we've talked to—you're the thirty-seventh person we've talked to in this trial and we have two jurors at thin point, so [1799] you can see it's a rather tedious process and things take a while. Not everyone is suited to serve on this particular kind of case. With that rather lengthy introduction, that's why we're talking to you individually and, if you will just he as open and honest as you can be with all of us, Mr. Cunningham, Mr. West and the Judge, who will be listening at the sane time I'm talking to you, if you will be as candid as you can be; then that will help us do what we need to do and find out whether you're the kind of person suited to serve on this kind of jury or not, okay?

A Okay,

Q Now, Mr. Rand, I feel like you have a right to know what our position is right now, Our position doesn't really count and yours does, but I want you to know where we're coring from. The State of Texas is actively seeking the death penalty for Thomas Joe Miller-El, that man sitting right down there, We feel like we could present to twelve jurors the type and the quantity of evidence that will convince then to find him guilty of capital murder and the type and quantity of evidence [1800] that will convince the jury beyond a reasonable doubt to answer those three questions yes that result in the death penalty. Judge McDowell has no options. If those three questions are answered yes by the jury, he must assess the death penalty, period, no ifs, ands, or buts about it, If one of those questions is answered no, he must assess a life sentence, Again, he has no options, so its up to the jury what's going to happen in this case.

Now, with that—I know you had a chance this morning to fill out a questionnaire, but you didn't have a whole lot of

time and we were shuffling in and out of the courtroom while you were trying to do it maybe over lunch you bad a little bit wore time to think about it, but would you tell us just briefly how you feel about the death penalty?

A That's kind of a touchy subject. In my own opinion, I think it could be enforced depending upon the crime itself: the circumstances of why someone was killed or could it have been avoided, that type of situation.

Q Okay. Have you given it any [1801] thought before today, Mr. Rand?

A No, not serious thought.

Q I understand that you haven't had a whole lot of time to think about it today, since you just found out three or so hours ago what the situation was?

A I think I've always pretty much had that sane attitude toward it, though.

Q That was going to be my next question, how long you have felt the way that you do now. You're not married; are you, Mr. Rand?

A No, sir;

Q Did you grow up here in Dallas?

A. Yes, I did.

Q Pre your parents here?

A Yes.

Q Would you venture a guess as to how your parents might feel about the death penalty?

A I couldn't because we haven't talked about it.

Q You-all haven't discussed it at all?

A. No.

[1802] Q. Okay. Do you have any brothers and sisters?

A Yes, one of each.

Q What about them, do you have any idea how they feel about the death penalty?

A No.

Q Okay. Well, you say you've felt this way for a period of time. Let me just tell you briefly, the death penalty in Texas only applies to, what we call, capital murder and that is murder in a specific situation or a specific set of circumstances; one, the killing of a police officer or a fireman when they're on duty or the killing of a prison guard. That's capital murder, Another type, as I think the Judge mentioned this morning, is a mass murder like we had at a bar a year or two ago. The third kind is what we're dealing with here, As the Judge mentioned, it's what we call murder plus. It's murder in the course of committing another offense. In our case, it's the offense of robbery.

Basically, what we've alleged in the indictment; Mr. Band, in that this defendant, Thomas Joe Miller-El, did knowingly [1803] or intentionally cause the death of another individual and that's murder, plain murder, but we've gone on further and said that he caused the death of that individual while in the course of committing or attempting to commit the offense of robbery. Now, we've got murder in the course of committing robbery. Is that the kind of thing that falls within your idea of a crime for which the death penalty should he considered?

A Yes, because of the murder knowingly. It wasn't a case of; say, self— defense or an accidental type thing.

Q Okay. Let me just touch on that for a minute, since you brought it up. We talked about murder in the State of Texas. We're excluding things like self-defense or accident or insanity. If something was done in self-defense and the jury finds that it was done in self-defense, then that person is not guilty of tire offense of murder, By the same token, if it's an accident, they didn't knowingly or intentionally cause the death of someone; hut it was an accident, then it's not murder. It's a not guilty or maybe an [1804] involuntary

manslaughter or something like that, but it's not murder. If a person is found to be insane, they're not guilty if they were insane at the time they committed the offense,

Basically what you're telling me is, you could consider the death penalty for this type of case; is that right?

A Yes? sir.

Q Now, Mr. Rand, I don't like to pidgeonhole people and T don't really like to put people into categories: but I guess it kind of serves a purpose for me in this situation, guess there are about four categories of people who come in and talk with us on cases like this. The first category is the person who comes in and believes in the death penalty, believes strongly in the death penalty, and says "I can sit on a jury and I can listen to the facts and I can assess the death penalty if it is warranted. I can handle that." The second group would be a person who believes in the death penalty. There's no question about that, but for morel or philosophical or religious reasons; whatever, [1805] they don't feel like they're the type of person who can sit on the jury and actually be involved in assessing the death penalty. They feel it's right and they feel it serves a purpose, but they don't feel like they could be the ones to actually do it. The third group is a group of people who are against the death penalty, but they don't really feel all that strongly about it. If called upon to serve on a jury and answer some questions, they could do that even knowing it would result in the death penalty. Although they don't really believe in it, they just don't feel that strongly one way or the other. The fourth group is a group that doesn't believe in the death penalty and will not he involved in assessing the death penalty under any circumstances whatsoever, Can you give me an idea of where you fit in those groups?

Probably in between the first two, sitting in the jury and being able to say, "Okay, he's guilty." and being able to do that. But again, somewhere along the line, T would probably

think to myself, you know, "Can I do this?" you know, right now I say I can, [1806] but tomorrow I might not.

Q. Okay. Well, let ne just kind of—you know, lawyers, when we're picking juries and talking about things, we kind of talk in the abstract, We talk about, well, could you do this in a case, could you give the death penalty in some case, somewhere, you know, but now, as you've realized, I guess, from this morning, this is real, We're here now and we're talking about that man sitting right there, In this case, if the evidence is presented the way we anticipate it will be presented, we will ask you, number one, to find him guilty of capital murder, We will ask you to find that the answers to those three questions are yes, a yes answer to each of those three, Now, what that means is, that man right down there, Thomas Joe Miller—El will be, at some point, taken to Huntsville, Texas and he'll be placed on death row and, at some point, he will be taken to what's called the death house in Huntsville, Texas and he will be strapped onto a gurney and an TV will be inserted into his arm and, as he lays there, a substance, lethal substance, will be injected [1807] into him until he is dead and that will be as the result of the verdict that twelve jurors rendered in this particular case. Now, I don't say those things to scare you or to make things seem horrible, but I feel—it's just like applying for a job, Mr. Rand; we feel like you need to know what you're getting into because once you have a seat over there: it's too late to say, "Hey, wait a minute. I just can't do something like that," Although we can't go into the facts of the case and we can't go into any of the circumstances surrounding the case, I want to tell you as much as I can about what you're going to be dealing with so you can tell me now whether you can serve or not serve on this kind of case, Let me assure you of one thing. I told you that we have talked to thirty-seven people or thirty-six before you and we have two jurors. It's no great sin or it's not bad citizenship or something like that if you can't serve on this jury, It's a big decision and it's—

Mr. CUNNINGHAM: Your Honor, we're going to object to counsel for the State inferring that this [1808] panelist cannot serve on this jury. Everything that he has said so far indicates that he is qualified both by the law and by the questions that Mr. Nelson has asked him.

THE COURT: Overruled, Go ahead.

Q I don't mean to infer anything one way or the other, Mr. Rand, but you made the comment that you don't know what you're going to feel like tomorrow when it really comes down to it and that's why I'm asking you. Nobody is going to force you to do something that's going to violate your conscience or bother you so much that it's going to affect your deliberations or going to affect you deeply and emotionally for the rest of your life. No one is going to ask you to do that, I go hack to my job analogy. The Judge told you about the oath that you would have to take if you're going to serve on this case, I wilt a true verdict render according to the law and the evidence. Some judges put so help me God on it and some don't; but that's the oath, You don't [1809] have to take that oath. If it's going to bother your conscience or you just don't feel that you can, in good conscience; do something like that, no body is going to ask you to do that. Again, I've rambled on and rambled on about things and I'm not giving you much time to talk or think, either one, but I don't mean to do that. It's difficult not sitting over there right now; I know that, but we need to ask you what—do you feel like you could serve on this kind of jury and answer those questions yes, if the evidence calls for it, knowing that, without question, without option, that results in Judge McDowell assessing the death penalty for that man sitting right down there? Do you feel like you can do that?

A Yes, I do.

MR. WEST: I'm sorry, what was that?

A Yes. I do.

Q Okay. Now; you hesitated a few minutes ago and—

MR. CUNNINGHAM: Your honor, We'll object to that. We didn't hesitate.

[1810] MR. MACALUSO: Excuse me, Judge. There's nothing wrong in making a legal objection, Judge, but—

MR. CUNNINGHAM: Your Honor, we would object to the statement by Mr. Nelson that he hesitated. The prospective juror did not hesitate. The first tine he nodded his head and the second time he said yes and then the third time he said yes.

MR. MACALUSO:That's not a legal objection, Judge.

MR. CUNNINGHAM: Your Honor, I object to him inferring that the prospective juror did something that he did not do.

THE COURT: I think Mr. Rand is taking care of himself pretty well. Overruled. Go ahead.

Q Let me rephrase what I was saying, Mr. Rand, and, if I say anything at anytime that misstates anything you've said or if there's anything you don't agree with, I hope [1811] you'll tell me. I think you will. You've been talking and you're strong enough to tell me if I say something wrong or something you don't agree with, I want you to, but I remember you saying a few minutes ago that, well, you feel like you could today, but you aren't sure of how you'll feel tomorrow, That's what I was coming back to, have you given it enough thought now that you feel like you're pretty certain you could do something like that?

A Yes, I do.

Q Okay. So if we seat you over there and we prove beyond a reasonable doubt that this Defendant down here knowingly or intentionally caused the death of another individual without any legal justification or excuse and he did

it while in the course of committing or attempting to commit robbery, you will find him guilty of that, if we prove it to you?

A Yes.

Q Okay. Now, the burden of proof stays here. It's always here and we have to prove beyond a reasonable doubt and you'll make us do that, I take it?

[1812] A Yes, I would,

Q Okay. And you're telling us, that further, if after you've heard all the evidence, the answer to each of those three questions is yes, you can answer those questions yes knowing that the result would be that that man would be executed right down there?

A Yes, I could.

Q You're telling me you can do that?

A Yes,

Q Now, Mr. Rand, under the old system, up until about thirteen years ago, the jury, on a capital murder case; actually went out on the punishment deliberations and put on the verdict form life or death, There was no answering questions. Thirteen years ago the legislature implemented this procedure, using these questions and saying that the jury has to answer questions rather than saying life or death, even though, you understand, the effect is the same. We're getting to the same place, but we're just using a little different road to get to it,

Now, I guess that's put in there [1813] as kind of a buffer and that brings me to my next question. If, after you've listened to all the evidence and heard all the evidence, if you're so mad, so enraged by what you heard that you thought this guy has to have the death penalty, period, he just must have it based on the facts, that's the way you feel, but we present evidence and we don't prove the the answer to question number two is yes; in spite of your feelings and in spite of you thinking you're so mad that he's got to have it,

that's all that is good for him, could you still answer that question no realizing that it would result in a life sentence rather than a death sentence?

A If it wasn't proven to me.

Q. Okay. The other side is, if we proved to you that each of those questions should be answered yes, beyond a reasonable doubt we proved that to you, even though you feel that be should get a life sentence, can you answer those questions yes knowing that results in bin being executed, even though you personally feel he should get a life sentence?

A Yes,

[1814] Q Any problem with that at all?

A. No.

Q Okay. Now, Mr. Rand; we talked a little bit about murder a few moments ago and you mentioned that you could consider the death penalty if there was no self—defense and no accident and that kind of thing. Let me touch on that again. If we proved to you—and we aren't saying this going to happen in this particular case, but it might. Under this indictment; we have to prove to you murder in the course of committing or attempting to commit robbery. If we present evidence to you and all we prove is murder; he knowingly or intentionally caused the death of another individual and we don't prove anything about robbery at all then; would you agree with me, all we have then is just straight murder, not capital murder—

A Yes.

Q —because we don't have the extra crime? Okay. Now; when we talk about murder; we're saying knowingly or intentionally caused the death of another individual, We aren't talking about self—defense where people were in [1815] a fight and one guy pulled a knife and the Defendant shot him or something like that. We aren't talking about accidents where it wasn't knowingly or intentionally. It was an accident, We aren't talking about insanity where the law

says the man was insane, We're talking about the person knew he was going to kill; intended to kill and killed without any legal justification or excuse whatsoever. Okay, Even if it was a killing in the heat of passion where someone is just so enraged about something that had happened to a member of his family or something that they went and shot the guy that did it: that's not murder; that's voluntary manslaughter, It's not murder. What we're talking about is knowing or intentionally causing the death of another individual, not in the heat of passion or without any legal justification or excuse whatsoever. Okay. Are you with me on that?

A Yes.

Q Okay. What do you feel should be the minimum possible punishment for the knowing and intentional taking of another human being's life without any legal justification or excuse?

[1816] A I think I could still go with the death penalty on that.

Q You would still go with the death penalty on that. Okay, So you feel; if one person takes another person's life, that kind of—I guess the phrase I've heard used from time to time is an eye for an eye kind of situation, is that right, one person takes another person's life, he should forfeit his life?

A Yes,

Q Okay. Would you ever; ever consider a punishment as low as fifteen or twenty years?

Mr. CUNNINGHAM: Your Honor, we would object to the form of the question in that the law says—the law sets out what the range of punishment is, I think it is being totally unfair to this prospective juror to try to commit him to a particular number of years without telling 11m what the range of punishment is and also telling bin what the law says his [1817] duty would be.

MR. NELSON: I'm not trying to commit him, Judge, I'm just asking what he can consider, what he can think about, what his feelings are..

THE COURT: I'll overrule the objection, Mr. Cunningham. I'm going to give the lawyers, as you now, a lot of leeway here during voir dire to approach subjects the way they want to as long as they get to the right point eventually. I think we'll see that; so I'll overrule the objection.

Q After all that, Mr. Rand, we're back to my question. Do you feel like for the knowing and intentional taking of another human being's life without any legal justification or excuse could you even consider a sentence as low as fifteen or twenty years?

MR. CUNNINGHAM: Your Honor, we'll object to that question in that it is improper because he [1818] left out if it is proved beyond a reasonable doubt in the proper facts and circumstances of that case

THE COURT: Reask the question, Mr. Nelson,

Q Mr. Rand, maybe I didn't make myself clear. I thought I did. Obviously, if we don't prove the case beyond a reasonable doubt, you're going to find somebody not guilty: right, because that's our burden of proof?

A Right.

Q But assuming that we prove that the person knowingly or intentionally, not accident; not self—defense, knowingly or intentionally kills another human being without any legal justification or excuse whatsoever, then could you ever consider a sentence of fifteen or twenty years; down in that range?

A If that's the maximum penalty, yes.

Q If that's the maximum penalty?

A Yes.

Q Okay. Mr. Rand, the law in the [1819] State of Texas says that the maximum penalty for the offense of murder, not

capital murder; but simple murder, is ninety—nine years or life and a fine of up to S10,000.00. That's the maximum. I take it you wouldn't have any trouble considering the maximum, if that were the maximum; is that right?

A Right.

Q If you had your personal way, you would want to consider the death penalty in that situation?

A Weil, if it was proven that it was a capital murder.

Q Okay. That's all we ask, Obviously, you can't give the death penalty far a regular murder case?

A No.

Q The minimum under the laws of the State of Texas is five years for the offense of murder. Now, could you, again, for the knowing or intentional taking of another human life, under the p proper facts and circumstances: give a sentence of five years for knowingly and intentionally taking another human life?

Mr. WEST: Your Honor, [1820] again? improper question, improper as to the form. If he felt as though the case—I'd ask that this be added: If he felt as though the facts and circumstances warranted an assessment of five years. He's trying to get him to commit to five years without telling him if he actually felt it warranted a five year penalty. I would object to the form of the question.

THE COURT: Mr. Rand, the question is, in a proper case; if the facts and circumstances warranted it, where you had found someone guilty of the offense of murder and you thought that a five year sentence under those facts and circumstances was proper, could you assess it?

MR. RAND: Yes, if that's the sentence that could be given

THE COURT: Go ahead, Mr. Nelson,

[1821] Q Mr. Rand, you, as a juror, would decide what sentence is going to he given. Okay. You wouldn't be required to give five years. You aren't required, as a juror on

a murder case; to give five years. You can give anywhere up to life or ninety-nine years: T thought I heard you saying—and I was having a little trouble hearing because you were talking to the Judge—that you could do that if that was what the law required or if that was what you had to do?

A Yes. If that what was put upon me, to say, "Okay, he's guilty and we're going to give him five years," would I go along with that, yes.

Q. Okay. Somebody is not going to tell you that you have to give five years. That's your decision. If you can't consider and assess five years, under the proper facts and circumstances; then that's fine. Nobody is going to argue with you, hut we're just trying to find out because; again; we're going to have to have twelve people who we feel are suited to serve on this particular kind of case. That's is part of that; so I Guess I'll ask the question [1822] again. Could you give five years in a proper case where the facts and circumstances justified it or would you, from what you've told me, want to give more than that?

A I want to give more.

O Okay, Are you telling me, if the facts and circumstances—well, whatever the facts and circumstances, you could not give a five year sentence for the offense of murder, knowingly or intentionally taking another human being's life?

MR. CUNNINGHAM: Your Honor, we'll object to the form of the question because, again, it leaves out the—what the law says, if he felt under the facts and circumstances of that case it warranted five years, could he give five years

THE COURT: Reask the question, Mr. Nelson.

Q You said earlier, Mr. Rand, that you even thought a person like that should get death- If you were setting the laws; you would allow death to be considered; is that right?

[1823] A Yes, I would have to consider it.

Q Okay. But is there any way that you could consider five years for knowingly and intentionally taking another person's life?

MR. WEST: Your Honor, again, I would object and my objection is that it is at improper question. Improper question in that the question should he, under the proper facts and circumstances in Mr. Rand's mind, if he thought the facts and circumstances warranted it, could he consider and also give five years for murder as Mr. Nelson has described it?

THE COURT: Do you understand the question, Mr. Rand?

MR.. RAND: I think so, What he's saying, warranted, does he mean, okay, this is what is going to be given or exactly what is it?

THE COURT: Well, I think you've answered the question properly, Mr. Nelson; go ahead, [1824] Re-ask the question.

Q Mr. Rand. again, when we talked about—when you've heard me use the word warranted, no one is going to dictate to you, as a juror, what the sentence must be. Nobody is going to dictate to you that it must be five years, any more than anyone is going to dictate to you that it must be twenty years or it must be forty-five years or anything else, If you're a juror on a murder case, you're the one who is going to make that decision yourself. What we're asking you, basically, is—you've already found somebody guilty of knowingly or intentionally taking another human life without any legal justification or excuse, Are you with me to that point?

A Yes.

Q Okay. Once you've found them guilty of that, could you ever, under the proper facts and circumstances, vote for a sentence of five years in the Texas Department of Corrections for that offense?

MR. CUNNINGHAM: Your Honor, we will object to the form of the question because it eliminates that [1825] part

that the law says it should have and that is, if he felt that the facts and circumstances of that case called for five years, could he consider it and do it,

THE COURT: Go ahead ask the question.

Q Mr. Rand. let me just put it as simply as I can put it. Would you ever feel five years was justified under any facts and circumstances for the offense of murder?

A No.

THE COURT: What was your answer, sir?

MR. RAND: No.

Q You've told us, I think, that you feel death should be proper. If you were setting the law or you were making the laws yourself, you would feel that death should be a proper consideration under those circumstances?

Q Yes, it should be considered.

Q Okay. Now, Mr. Rand, I remember an old show years ago called Queen for a Day. If you were governor for a day and you could set the minimum punishment in the State of [1826] Texas for the offense of murder as I've set it out, knowingly or intentionally causing the death of another individual, what would you set?

A Probably the maximum that you gave me, ninety-nine or life.

O Okay. You would set that as the minimum?

A Yes.

Q Okay. And there's no way you could ever consider and give five years for that offense; is that right?

MR. CUNNINGHAM: Your Honor, again, we object to the form of the questions It's an improper question the way he asked it of this prospective juror.

Q Under any facts and circumstances, as long as it's a murder the way I've laid it

MR, CUNNINGHAM: Your Honor, we will object to the form of the question. It's an improper question.

THE COURT: Ask the question [1827] again or I'm going to take it over,

Q Mr. Rand, am I confusing you?

A No.

Q You think you understand what I'm asking?

A Yes.

Q Okay. I certainly don't mean to confuse you and, if I didn't tell you at first, I'll tell you now, If I am or if you have a question, ask it, because I want you to be clear on what we're talking about.

A Okay.

Q I thought I understood you to say, if you could set the minimum, you would set the minimum at life or ninety-nine years and you would have death be a consideration?

A Yes.

Q Now, I thought you told me that, under no facts and circumstances, ever, would you consider a sentence of five years; is that right?

A Right.

Q Okay. Mr. Rand, I told you up front that I'm not going to argue with you and [1828] I'm not I would guess, from what you've told me—and you've been pretty definite about it—even if I sat here and talked to you for two weeks, I wouldn't change your mind on it, would I?

A No.

Q And that's the way you feel about it and that's the way you're going to feel about it; is that right?

A Fight.

Q Okay. I don't have any problem with that and nobody is going to argue with you or try to change your mind at all, I guess nobody could, if they wanted to; is that right?

A Right.

Q Okay. Mr. Rand, no one has a right to argue with you about that and no one should argue with you about that because that's your opinion find that's why we have you up here.. is to find out how you feel about things, so I'm sure nobody else is going to argue with you about it, either. I'm about of time and I've thrown a lot of stuff at you. You've been very open and honest with we and I appreciate that, no you have any questions for me? Is [1829] there anything else we need to touch on here that I haven't touched on?

A No. I think everything is pretty clear right now as far as what you've asked me, I think I've understood everything.

Q Okay. I don't think I have any other questions for you; Mr. Rand; if you don't have any for me, There's no way, even if I kept discussing it with you, I could change your mind, so I'm not going to bother you any more. I appreciate very much your tin.e and your patience with me and the openness of your answers. These lawyers will probably want to talk to you a little bit, Thank you very much.

MR. NELSON: Your Honor, we'll submit the juror.

THE COURT: I'll add a couple of minutes onto your time to cover that submission, if you want to.

MR. WEST: If it please the Court.

THE COURT: Go ahead.

[1830] EXAMINATION

BY MR. WEST

Q Mr. Band, ray name is Royce West. How are you doing this afternoon, again?

A Okay.

Q Okay. First of all, let me assure you that no one is arguing with you. Did you feel as though Mr. Nelson was arguing with you about anything?

A No, not really.

Q Okay. I'm not going to argue with you about

anything, either, okay?

A All right.

Q Now, it's okay to feel the way you feel about certain matters. There's no problem with that at all, It's okay to feel about different, controversial subjects the way that you feel. about them. I'm not going to argue with you about that at all, In fact, I would defend your right to say what you want to say no you understand what I'm talking about?

A Yes.

Q Okay. Now, Is this your first time ever to come down for jury duty?

A Yes, it is.

[1831] Q Okay. It's an experience and a half?

A Yes, it is,

Q Okay. Do you consider yourself basically a law and order person?

A Yes,

Q Do you feel as though you follow the law?

A Yes.

Q And that everyone should follow the law?

A Yes.

Q Okay. How much do you know about the judicial system?

A I guess not a lot.

Q You realize that everybody has a right to be tried by their peers?

A Yes,

Q Now, one thing that Mr. Nelson was harping on was your ability to take into consideration, under the proper set of facts and circumstances, and assess the minimum and also the maximum penalty in a murder case.

Q Okay. Now, no one is trying to get you to commit to anything. You realize, as [1832] he indicated, the minimum for murder is five years and the maximum is ninety-nine years; life and an option of a fine of $10,000.00. Our legislature set that range of punishment. The people down in

Austin who make the laws, they set that range of punishment because you can have fifty million different fact circumstances that call fall within that range of punishment: so they wanted to give people that particular range to work with when they're serving on a jury and when they're making a determination as to what the proper sentence should be. Do you understand that?

A Yes.

Q Okay, Now, I'm not asking you to commit one way or the other to saying that you would give somebody five years in the penitentiary. I'm not asking you to do that, but- I'm asking you; if you felt as though you, if you felt as though the proper facts—number one, you found someone guilty of murder, okay—and circumstances existed in your mind, that under those facts and circumstances that you would; number one, consider and; if you felt as though the circumstances and the [1833] facts called for it, assess a penalty of five years. I'm not saying that you have to—again, this is your first time down here. There's fifty million circumstances and you don't have to think of one in your mind, okay?

A Yes.

Q And you know that's what the law is, five years to ninety-nine years or life. I'm asking you, could you consider; under the proper facts and circumstances, assessing a minimum of five years confinement?

A If I had to

Q Okay. If that's what the facts called for?

A Yes.

Q Now; let's explore that a little bit more, You said if you had to, You don't have to do anything.

A Right, Well; when I said that, I was meaning as to what you added onto it, if the facts—

Q if you felt the facts called for it?

A If that's what it called for; yes.

Q I'm kind of misunderstanding you. [1834] You said if that's what it called for. What do you mean?

A Okay. When I said that; I was meaning as of what you tagged onto it, if that's what the facts brought about to it and this was it. Myself and my preference would prefer to have more, but I would consider it.

Q If you felt as though the facts called for it, you could assess it; is that correct?

A Yes, I could,

Q Now; what I want to make sure that you understand, no one is trying to commit to saying "I will give five years." "I'll give life." What we have to know—and there's some confusion as to whether you can consider the full range of punishment, from five years to life, in your mind, if you said these facts called for it, even though a person knowingly and intentionally took the life of someone else without any legal justification such as self—defense or any legal excuse such as insanity; that he knowingly and intentionally took the life of someone, that I can consider the full range of punishment; from five years to life, [1835] and a $10,000.00 optional fine. I can consider it and; under the proper facts and circumstances in my mind; if I felt as though the facts warranted it or justified it; I could give that person five years?

A I would consider it.

Q And you could do it if you felt as though the person should receive five years, is that correct?

A If I felt that,

Q Okay. Understand something now. I'm not saying that you have to give it to a person. I'm saying; if you felt as though the facts and circumstances called for it; that you would give a person five years?

A I would consider it?

Q You said that you would consider it?

A Yes.

Q The law requires—and this is the law—that you not only be able to consider it, but you would be able to do it,

also, if you felt as though the facts called for it. I'm not trying to get you to commit to it. I just want to make sure you have an open [1836] mind to it.

A Well, I think I could; but I wouldn't want to—well, I couldn't then.

Q I'm sorry?

A Well; if we don't have that difference, I would say I couldn't because I couldn't consider—

MR. NELSON: Did he say could not?

THE COURT: I don't know.

MR. RAND: Right.

A Because I could consider it. Now; whether I would like to or not, in my own opinion; I wouldn't want to. Is that what you're asking me?

Q You're saying that you wouldn't want to. I don't have any problems with that, I'm just saying; if you felt as though the facts and circumstances called for it in your wind —— again, this is your first time down here and there's fifty million circumstances that could come up where a person knowingly and intentionally took the life of someone else without any legal justification legal excuse. 7 I'm saying, you Know, would you keep [1837] an open mind and: if you saw those facts and circumstance would you, not only consider it, but also assess the minimum of five years?

A Yes.

Q You can do that? Again, I'm not trying to tie you down to saying you're going to give somebody five years, okay?

A Yes.

Q I'm not trying to tie you down to saying you'll give somebody life, either: but T want you to be able to; if you can; and you said that you could, consider the full range, from five years to life; and; if the facts and circumstances, in your mind; called for it, be able to assess the minimum of five years, which you said that you could, or assess the maximum

of life, which you have to call it like you see it Do you understand what I'm talking about?

A Yes.

Q Can you do that?

A Yes, I could.

Q All right. Now, let me ask you this – Mr. Nelson basically asked you the same question. Was there some communication problem that you didn't understand what he was saying [1838] or what?

A Well, maybe what I was understanding from him was—the way I took it was, what would I do, Okay. Your question was, could I consider or be able to. Yes, I could. Under his consideration; I would want more, but I could consider and give five years if I had to,

Q If you felt it was—

A Well, if that was what was adjustable.

Q I'm sorry?

A If that's what was adjustable under the facts and circumstances.

Q Yeah, that's all I'm saying, You know, you may very well want to—let's get off that for a second- I see that you—what school did you graduate from?

A Skyline.

Q What particular cluster were you in?

A I came out of plastic technology. The first three years I was in automotive.

Q I wash noticing some to the literature that you've read dealt with [1839] automobiles. Again, would this be a fair statement, that people should obey the laws as handed down by our legislature?

A They should.

Q Okay, Would it be a fair statement to say that everyone should, in fact, try to be involved in voting and the jury system and the criminal justice system, also? People should try to be involved in civic affairs is basically what I'm saying.

A If they prefer to.

Q Okay. Now, what are your thoughts about the criminal justice —— have you ever just thought about the condition of the criminal justice system?

A No, I haven't.

Q I'm sorry?

A No, not just serious thought,

Q What are some thoughts that you've had about the criminal justice system?

A Well, possibly say a crime of maybe just robbery and then a separate crime of; say, murder. Why could, maybe, the guy that murdered somebody go to jail for five or six years and that's and maybe a guy that [1840] steals something from a Seven—Eleven has to go for fifteen.

Q So unequal justice?

A Yeah, You know, it sounds kind of funny.

Q What doesn't sound—

A Hee, myself; being on the outside, I'm looking at what is there on the paper in the news. I don't know the facts or anything, really: behind it, but all I see is, okay, this man got fifteen years for robbing a Seven-Eleven and this guy got five for a killing.

Q Do you understand that there are probably a lot of variables that you don't know about?

A Yes, That's what I'm saying. I don't know all of the background to it.

Q Exactly, because there may be one situation where a person gets five years for robbery and a person gets fifteen years for murder?

A Yes.

Q And it's a plea bargain as opposed to a jury trial or a trial before the Court. There are a lot of variables involved; [1841] do you understand?

A Yes.

Q It gets basically back to what I was talking about, There's a wide range of punishment open for various types of

offenses. Did you know that aggravated robbery was a first degree felony offense and that the minimum you could get was five years just like in a murder case?

A I didn't.

Q Okay. Did you know that burglary of a home is a first degree felony just like murder, just like aggravated robbery and the minimum you could get is five years and the maximum you could get is ninety-nine years or life and an option of a fine of $10,000.00.

A No, I didn't.

Q There are numerous other first degree felonies: also- Wow, the only thing that the law requires: in order for you to serve on this jury, is you be able to consider the full range of punishment, that being from five years to ninety-nine to life, and, under the minimum facts and circumstances, in your mind, ff the facts called for it and you [1842] feel as though it's justified, be able to assess the ml n ~ mum of five years and, if the facts called for life, be able to assess life. Can you do that?

A (No response,)

Q Again, this is an individual thing, being able to consider It and; if you believe in your heart that the facts call for it, be able to give five years. I believe you indicated earlier that you could.

A Yes, I could.

Q Can you do that sir?

A Yes, I could.

Q Now, you're telling Mr. Cunningham and myself, as Miller-El's attorneys, that you could consider and assess five years if you believed in your heart that the facts called for it?

A Yes.

Q Now, do you understand what Mr. Nelson and I were talking about concerning the minimum sentence of five years?

A Yes, sir.

Q Do you have a full understanding of it?

[1843] A Yes.

Q And basically the full range of punishment?

A Yes.

Q Mr. Rand, I believe you're qualified to serve on this jury, Thank you, very much.

MR. WEST: I'll pass the juror.

THE COURT: I'll hold that the juror is qualified on your submission, Mr| Nelson. You still have about a minute left on your record of time.

[1844] EXAMINATION

BY MR. NELSON:

Q Mr. Rand, again, the last thing T want to do is argue with you myself, but you realize that you told me one thing and told Mr. West something else and I guess there is some confusion there and I don't want you to be confused. You kept going back to if it was up to you or what you would do. I think words were used: you know, what would I do. I thought you told me that, if you were making the decision, you would want either life or death for this type of offense; is that right?

A Yes, but the way he questioned me, I could consider five.

Q Okay. What we're talking about, if you're on a jury and you're sitting over there on the jury and you hear the facts and it's been proved to you beyond any reasonable doubt that this defendant knowingly or intentionally took the life of another human being, killed them, knew he was going to do it and did it without any legal justification or excuse whatsoever—it's easier to talk in the abstract we're talking about a guy who has [1845] been found guilty of killing another human being and you're sitting on that jury. We're just asking you to be as honest about it as you possibly can be. I know that's what you've been trying to do, but being

just as honest about it as you can with us and with yourself, could you really consider and assess a five-year sentence under any circumstances?

MR. CUNNINGHAM: Your Honor, we'll object to that as an improper question in that, if he felt that the ?roper sentence was five years.

THE COURT: Do you understand that, Mr. Rand?

MR. RAND: Uh—huh.

THE COURT: Go ahead and answer the question.

A Okay, I could consider it.

Q If you were sitting as one of the jurors in that box, could you sign your name saying, I'm not just thinking about it; "I'm going to give this guy five years. He killed somebody. He knew he was going to do it. He did it, but I'm going to give him five years."?

[1846] MR. WEST: Your Honor, again, that's an improper question. If the facts and circumstances call for it and he believed in his heart that the person should get five years. Improper question.

THE COURT: Ask the question, Mr. Nelson; one more time. Your time is up though, but go ahead and ask it one more time.

Q Mr. Rand, again, I'm just trying to find out what you really feel, down inside what you really feel, okay, You've convicted somebody of murder, not voluntary manslaughter; not self—defense, no accident. You've convicted them of murder, knowingly or intentionally causing the death of another human being and you've found them guilty beyond a reasonable doubt and you're sitting on the jury. You've heard all the facts and circumstances, You know everything you're going to know, You've said, in a proper case, you could

consider five years, but you also kept saying that, if it were up to you, in [1847] your heart, you would want to give more. Am I right about that.

A Yes.

Q Okay. So even if the facts and circumstances justified i1 where you could consider it, being real honest about it; could you give it?

A Yes I could.

Q Is there any question about that; because you've changed from what you told me before?

A No—well, I don't know. From the first time you asked me to now, if maybe the way you said it or my understanding was different, but I could consider it and, if shown, yes. But under the same token, I would think that I would go the way also.

Q You understand that nobody is going to prove to you—

MR. WEST: Excuse me. Your Honor, I think the State's time is up. We keep going over it. He's already said that he could [1848] consider it and, under the proper facts and circumstances he could do it. The State is asking for additional time and the Court has already told him that his time was up. I thought he had already asked his one question and now he's going to something else.

THE COURT: Mr. Nelson, bring it to a close.

MR. NELSON: I'm trying to, Judge, but he said something else in the same area that I want—

THE COURT: I think probably the lawyers could be here all afternoon the way we're going.

MR. NELSON: Is the Court stopping me at this point?

THE COURT: Go ahead and ask one more question.

Q I've forgotten exactly the words you used now, Mr. Rand, but you're telling us—well, you said if it was proven to you that he had to get ninety-nine years—I think the words you used were something to that [1849] affect—or it was proved to you that he had to get five years—

A That it was adjustable on that case.

Q You understand that it is always going to be your decision? It's up to you. Nobody is going to prove to you that anybody has to get five years and, if you couldn't consider and assess five years in a proper case, then that's fine. Nobody is going to get down on you for being a bad citizen or anything else because you can't. We just need to know.

A I could consider it, but I couldn't sit here and say that I would give it to him. Is that what you're asking?

Q Well, we can't commit you right now to saying that you would do it.

A I could consider it, but I couldn't say whether I would give it to him.

Q The law says consider and assess. Okay. Not only consider, but you have to be able to tell us that you could give it.

A Yes, I could.

Q You're saying that you could?

MR. WEST: He's already [1850] answered the question two times, Your Honor.

THE COURT: Well, he's through now. Mr. Rand, the only question I want to ask—and ably tired of these lawyers asking you questions, but let me sum it up to make sure tha I understand. The law says that everyone of these twelve jurors who are going to be sworn in this case has to have an open mind to the entire range of punishment that might be provided for in this particular case. Now, earlier on—and we're not

even arguing about this—you told the State a capital murder case, they proved those questions to your satisfaction beyond a reasonable doubt, you could answer them yes. We're not talking about that. We're talking about a case where you, as one of the twelve jurors, has found a [1851] Defendant guilty of the offense murder, which is the intentional or knowing or both causing the death of some individual by some manner or means. The punishment range for that offense of murder, under our law—it applies in all murder cases and not just this one, but in any murder case is a prison sentence of not less than five nor more than ninety-nine years or by a life sentence. I don't know if the lawyers mentioned it or not, but there is also an optional fine of up to $10,000.00, if the jury wants to fine in addition to a prison sentence.

Now, what the law says is, each juror who is seated must be able to within that range depending on what the facts and circumstances of that particular case tell you, as an individual juror and then [1852] you working together with the other eleven jurors, is a proper punishment in the case. Now, what the lawyers are asking you is, and it was asked several different ways at several different times—now, let me qualify my question by telling you some of the things the lawyers said.

You don't have to imagine a case it would take for you to assess any particular punishment. In other words, you don't have to be able to tell me, well, I could give ninety-nine years if it involved killing a baby or something like that or I could give five for this or that. In fact the law wouldn't even let you do that because that means in my mind and, I think, in the law's mind that would be the only case in which you could do that particular thing. The law doesn't require you to imagine the facts [1853] it to vote for some particular punishment. The law does say that you have to have an open, mind to the entire range of punishment so, if you heard a set murder case, after those facts and those circumstances, having found the

Defendant guilty of the offense of murder—and we talked about what that was, but you found him guilty of murder—if the facts and circumstances presented themselves to you and in that particular case you thought a proper punishment was a five year sentence, which is the minimum sentence, you could and would vote to assess that as the punishment in the case. Now, the question to you is, in a proper case, if the facts and circumstances warranted it in your mind, could you and would you vote to assess a five-year sentence?

[1854] MR. RAND: Yes, I think I could keep an open mind.

THE COURT: Can you give me a yes, I would—

MR. RAND: Yes.

THE COURT: —or a no, I wouldn't?

MR. RAND: Yes.

THE COURT: I'll hold that qualified, Mr. Nelson. What says the State?

MR. NELSON: At this time, Your Honor, the State would exercise a preemptory challenge.

MR. WEST: Your Honor, I want the record to clearly reflect that—

MR. NELSON: Could we take this up outside—

MR. WEST: Judge, I think it should be taken up in front of Mr. Rand's face.

THE COURT: Well, I'll let it be done at this time.

MR. WEST: I want the record [1855] to clearly reflect that Mr. Rand is a black male and he's twenty-three years of age.

THE COURT: Mr. Rand, thank you for your patience with us, first of all. You will be excused from service in this case. If you would leave your badge with the bailiff as you go out—this is off the record, Pam.

(Whereupon, an off-the-record discussion was held, after which the following proceedings were held.)

MR. NELSON: The State exercised its preemptory challenge because Mr. Rand was ambivalent about the death penalty and at the first of the voir dire, his ability to serve on a jury like this and he stated himself that he wasn't sure whether he fitted in category one where he could serve on the jury or category two where he could not. That was the [1856] State's concern for exert preemptory challenge in this case.

THE COURT: Let's take a short recess so I can make a phone call I should have made two hours ago.

MR. MACALUSO: Judge, if I may say something. I realize that everyone has the right to make a legal objection, I guess, at the time. I didn't really actually keep count this last time, but if there were ten objections over this very limited area, ten nonlegal objections, to questions—and I miscount—all I'm asking, Judge, is, if we stand up and make nonlegal objections, the Court call it to our attention, as I've asked the Court to do with the other lawyers in this case, if we're ever going to get a jury in this case.

MR. CUNNINGHAM: Your Honor the only reply we would make to

* * * *

[1866] JEANETTE BUTLER,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. MACALUBO:

Q Good afternoon, Ms. Butler. Let me begin by reintroducing every one here. I'm Paul Macaluso. This is Jim Nelson. Another lawyer, a district attorney, will be once the

trial begins. His name is Kinne. We haven't seen Norman in a because he has the chicken pox. fifty years old and he's been disabled, of course, for about two weeks. It makes a difference at that age.

The gentlemen to Jim's immediate left is Brice Cunningham.

MR. CUNNINGHAM: How are you, Ms. Butler.

Q The gentlemen who was just in here a moment ago is Mr. Royce West. They were introduced to you this morning, also. We are assistant district attorneys who represent the

* * * *

[1870] position or try to talk you out of a position. Just tell us how you feel about anything and you'll be doing your job as a prospective juror.

What we're trying to do here is find twelve people who are best suited, twelve that we both agree on, both sides agree on, and can actually serve on this type of case because not every one can. I mean, you're number thirty-eight and we only have two jurors. see arithmetically how few people are suited to serve on this type of a case.

Now, let me tell you what our position is just in fairness to you going into Ms. Butler, we are actively seeking the death penalty in this case for Thomas Joe Miller-El and we make no apologies for it. We know that the law allows for it under certain circumstances and we intend to be able to provide a jury—and that would mean you if you're on this jury—the type and qualify of evidence that would convince this jury beyond a reasonable doubt in the first part of the trial that Thomas Joe Miller-El is guilty of the offense of capital [1871] murder. That's our responsibility.

Then in the second part of the trial, to provide the jury with the type and qualify of evidence that would convince them that the questions that the Judge would give you at the end of

the trial, those three questions there, should be answered in each instance yes, yes, yes. You know that the effect of three yes answers—what is that?

A The death penalty.

Q That's right, automatically. You might as well write death in there. Three yes answers dictates to this Judge, under the law, what he must automatically and definitely do. Now, the reason why I say that is just to put you on notice. You know a lot of people come down here and they're kind of caught up and they don't realize—you know, they think they're going to be on a shoplifting case or a marijuana case or a burglary case and here they are. They're sent down to a jury room where they're talking about death and capital punishment. You see, it's no longer, like it may have been, where you read about something or you talk about it with your husband or [1872] people you work with or your friends, about how you feel about the death penalty. You're in the thick of it basically. I don't know of a better way to put it. We just want you to know what the stakes are here and we intend to provide this jury with the type of evidence that ultimately will result in convicting this man ultimately result in this man being taken down to Huntsville, Texas, strapped to a bed, a hospital bed, taken into a room where they will put a needle in his arm and they inject him full of a lethal substance that going to end up killing him under the law.

Anyone who comes down here, like yourself, as a prospective juror, just in fairness ought to know what the stakes are and what you would be called upon to do under the law based on the evidence if you serve on the jury. It kind of goes back to what the Judge said. The Judge it's kind of like—I know he said this to other jurors that he talked to—it's kind of like you're given a job description. Just like this job you're taking now, I'm sure you wanted to know what it entailed, didn't you?

[1873] A Uh-huh.

Q If it wasn't what you set out for, then you're not going to sign up for it, are you?

A That's right.

Q In fairness to you—and we could hide the ball and say, you just answer these questions and then at the end you find out that someone is being executed what effect that might have on certain people?

A Uh-huh.

Q All right. I'm going to stop and let you do some talking. It's your opinion that we want to hear. You were asked the question how you feel about the death penalty. They only gave you three lines and you've got almost four lines. There's nothing magic about those three lines. You were given precious little time to think about this. I mean it's not like you had a week or so to dwell on it.

Would you just tell us in your own words how you feel about the death penalty?

A I think it should be given. The death penalty should be given in certain circumstances. As I said people hurting

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[1945] were held.)

THE COURT: Do you-all want to argue?

MR. CUNNINGHAM: I don't. THE COURT: Let me get on Mr. Cunningham, sustain the State's challenge to Ms. Butler. The court is going to let the record reflect—and I'll let the lawyers challenge me on this. This lady really an interesting juror. I think she was somewhat emotional in appearance from time to time, but I don't have any doubt that—well, she didn't always accept what the lawyers said as gospel or the Judge, for that matter. I think she probably understood what her situation and relationship would be as a

juror in this case. After watching her and hearing all of her answers, this Court believes and finds that her views about the death penalty

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[1948] LOUISE CARTER,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. NELSON:

Q Good afternoon, Ms. Carter. As I was introduced to you earlier, my name is Jim Nelson. I'm an assistant district attorney here in Dallas. The gentleman seated next to me is Mr. Paul Macaluso. As I think you were told this morning, there will be one other gentleman involved in this for the State of Texas and his name is Norman Rinne. Mr. Rinne who happens to be about fifty years old, is home again this week with the chicken pox and has been for a couple of weeks. We've given him a little bit of a hard time about that. will be presenting the evidence for the State of Texas in this case. The three of us are a assistant district attorneys and have been assigned to this case by Henry Wade, the elected district attorney, to handle it for the State of Texas.

* * * *

[1998] minutes and you'll be on your way one way or the other.

Mr. Carter, maybe I don't send you out. Maybe I can decide this. Ms. Carter, I'm going to excuse you from service in this case. I'm going to sustain the State's challenge. Off the record, Pam.

(Whereupon, there was an off-the-record discussion, after which these proceedings were recessed to Tuesday, February 18, 1986, at which time the following proceedings were held.)

THE COURT: I want to ask you, to make yourself as comfortable as possible. Sometimes that is easier said than done. The reason you're up there is because it gives us a chance t hear you and the lawyers to see you better from up here and everything. The only thing I want

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[2000] CARROL S. BOGGESS,

called as a jury panel member, having been sworn by the Court to testify to the truth whole truth and nothing but the truth, examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Good morning. I'm trying to crank up on time here this morning and get my voice going here. Ma'am, let me begin by reintroducing most of the people who will be involved in this case. We were introduced to you the other day. My name is Paul Macaluso and the man that just walked out, who will be seated right next to me in just a moment, his name is Jim Nelson. Once the trial begins, we will be joined by another lawyer. His name is Norman Kinne. We're all assistant district attorneys and we work for Henry Wade who, I'm sure you know, is the district attorney here in Dallas. He's designated us as the lawyers to represent the State in this case.

Now, the gentleman that pointing to at this moment is Mr. E. Brice Cunningham.

[2001] MR. CUNNINGHAM: Good morning. How are you?

Q I imagine in not too long he will be joined by Royce West. He will be seated between the Defendant and Mr.

Cunningham. Mr. Cunningham and Mr. West are defense attorneys who have been appointed by the Court to represent the Defendant. He is seated to your very far right. You can see him, I think, if you lean forward. He's in the powder blue sui there. His name is Thomas Joe Miller-El. He is charged with capital murder and he Defendant. Dow, the reason why I've taken—that's Mr. Nelson.

MR. NELSON: Hi.

Q The reason why I've taken the time to reintroduce every one here is to let you hear our names again and then reacquaint you with the roles that we all play in this case so you know what we do or are supposed to do. would just like to ask you if you know or recognize any one of us?

A From yesterday.

Q Other than from yesterday?

A No.

[2002] Q I know your husband works in the office. I think I know—

A I'm sure you know him. He's beer here a while.

Q He's been around for quite a while, hasn't he?

A Yes.

Q I don't think that we have ever met. I don't recall having met you, but I see Joe here all the time. As you will know, Ms. Boggess, you are a prospective juror on this capital murder case. As I'm sure you know at this time, capital murder is a very, very serious offense. In fact it is the most serious offense under the laws of this state, as you well know, serious because of the nature of the offense. Obviously it involves a capital murder. Equally as serious, I suppose, because of the two possible penalties for a person who is convicted of capital murder. You know if a person like Thomas Joe Miller-El is convicted of capital murder, then he can receive only one of two possible penalties. one is a sentence of death by lethal injection [2003] in his arm or a sentence of life in the Texas Department of Corrections.

You can see obviously how serious everything is connected with this type of case. Probably because of that, Ms. Boggess, the law allows us to talk to you individually as we're doing now. Have you ever been down here on jury duty before?

A Uh-huh. I don't remember the year. I think it was a couple of years ago.

Q It was a civil case, do you think?

A Uh-huh.

Q If you were talked to by the lawyers as I'm pretty sure you would have been, you were probably talked to when you sat out there in the gallery, weren't you, and you were asked questions and you answered up in front of everybody else. That's fine for most cases because most cases don't involve the death penalty and how you feel about the capital punishment laws and the death penalty statute and so forth and so on. The law allows us to talk to you individually, kind of semi-privately, like we're doing now because they want you to relax as much as you can. Are you [2004] a little bit nervous?

A No, not really.

Q Well, there is no need to be nervous because nothing yu can say will be wrong. For that matter, it won't be right, just as long as you tell us how you feel. No one is going to quibble with you or quarrel with you, argue with you, try and talk you into anything or out of anything. You are the most important person here in this room right now and your opinion is the most important opinion. So whatever is on your mind, I don't care what it is, if it affects your service as a juror, you just tell us, all right, and you will be doing your job. If we ask the right questions, we'll be doing our job. Fair enough?

A Uh-huh.

Q Now, if you have a questions about anything, Ms. Boggess, by all means ask it because, you know, when you get on the jury you can't ask questions ordinarily of the

witnesses and the lawyers and so forth. If there is anything that you need to tell us, whether we touch on it or not, by all means let us know, all right, just in fairness to both sides.

[2005] Now, in fairness to both sides, let me tell you what our position is just from the very beginning. Ms. Boggess, we are actively seeking—that is, the State is actively seeking the death penalty in this case for that man right down there. It's only fair that we tell you right from the very beginning what our position is and what we intend to be able to prove and establish once the trial itself begins and then, of course, what would be expected of the jury on the basis of that evidence. We are actively seeking the death penalty. That is, we intend to provide this jury with the type and the quality of evidence—and that would mean you if you were on this jury—that would convince the jurors beyond any reasonable doubt that the Defendant, Thomas Joe Miller-El was guilty of capital murder just exactly as he is charged.

Then in the second phase of the trial, once again, to be able to provide that jury with the type and the quality of evidence that would convince them beyond any reasonable doutbt whatsoever that those questions that the Judge will give the jury at the end of the [2006] trial should be answered yes. All yes as you know, would result in the law requiring the Judge to sentence Thomas Joe Miller-El to be taken some day down to Huntsville, Texas an at an appointed time—the law designates the appointed time—he be taken to the death house to have a needle placed into his arm and thereafter have a lethal substance into his body to cause his death as the law requires under those situations.

I'm not trying to make this sound real gory or gruesome, other than the fact, ma'am, that it is only fair to you and every other juror—we've talked to about forty so far—to let you know exactly what the stakes are in this type of a case. I think you know anyway, but it wouldn't be fair to you to lull you

into some sense that this is going to be some kind of a—any other type of case when we know it's not and what the stakes are ultimately.

I think, as you well know, Ms. Boggess—you're thirty-seven years old and you know the difference between fact and fantasy o something you hear on TV or read [2007] about and then something when you're caught upright in the midst of it. Do you see what I'm getting at?

A Yes.

Q It's one thing to sit around and talk about what you might do in a situation, what you would like to do or what ought to be done and frequently—I know. I'm forty-three years old myself. I know that it is quite a different situation frequently when you're actually called upon to do something yourself. Do you see what I'm getting at?

A Yes.

Q That's what we want to know and that's why we're talking to you as intensively as we are. The reason I say that is this: You were asked about your feelings about the death penalty and whether or not you could actually serve in this type of case. As you well know, a lot of people have real strong feelings one way or the other about the death penalty, strong feelings one way or the other about whether or not they can actually serve on this kind of a jury because of their personal or conscientious feelings or religious or moral [2008] feelings one way of the other.

Now, I've done a lot of talking here so far as an introduction. Really what every one wants to hear is what you think and how you feel. I know you were asked this question yesterday and were given those three lines there to respond and very little time could you share now that you've had a night to sleep on it, to think about it, what your really about the death penalty and whether or not you can actually serve on this type of case?

A Well, I believe I could serve case like this, but whether I want to or not is a different thing. I wouldn't want to serve and I wouldn't want to have that responsibility to do that, but if it fell upon me, I would certainly take it and pray to the Lord to help me get through it. My feelings about the death penalty are just as I said, if I believed that a person truly had committed a murder, a premeditated murder or a murder—you know, intended to do something like that, then I would feel that it was my duty to judge that [2009] person and to decide whether or not that person you know—

Q I gather from what you're saying you feel strongly, obviously, about murder?

A Yes.

Q That a person ought to be held accountable for a murder type offense?

A Right, or punished for any type of crime that they commit.

Q I notice you put down here on your questionnaire, "Do you believe in the death penalty?", "Yes—only in cases of premeditated murder." I think you went on to qualify it by saying for an intentional murder?

A Right. I wouldn't want—you know, like the Judge talked about, self-defense or an accidental thing or something like that. I certainly wouldn't want to judge a person on that.

Q We'll talk about that in some detail in just a second, but you understand that a person can only receive the death penalty in Texas for a capital murder. A capital murder involves a murder itself. That's a component of capital murder. It's [2010] what we call regular murder—actually it's not called regular murder. It's just referred to as murder.

Murder itself is not a capital offense. In other words, you can't receive the death penalty for what we call regular murder. For example, if I kill Mr. Nelson and just kill him for whatever reason I have for killing receive the death penalty for his murder no matter how violent or brutal or vicious it may have been unless he falls undera particular category. For

example, if he is a police officer and I murder him and I know he on duty, I can receive the death penalty for that kind of a murder. But if it is just Jim Nelson, the district attorney, I can't do that. I can't receive the death penalty because that's a regular murder. If I killed you or you killed me, you see, that's regular murder. That's altogether different in the range of penalty. If you kill a jail guard or a fireman, mass murders, you see, murder for hire, those are capital murders. Otherwise, murder itself is a noncapital offense. Murder is a situation [2011] where one person knowingly or intentionally causes the death of another. You have to understand that that does involve a knowing and/or an intentional killing. I knew I was going to kill him. I intended to kill him. I killed him. Do you see?

Now, what the Judge said about insanity, self-defense, accident or a crime of passion, if you're on a jury and someone is charged with murder, but you believe or you have a reasonable doubt that someone killed as the result of insanity, self-defense, accident or a crime of passion—we'll talk a little bit more about in detail later—then you don't make it a lower sentence, you see, because if you believe that it is one of those four things, it's not murder, you see, because those are legal defenses or legal justifications for somebody killing somebody else. Do you see what I'm getting at?

A Uh-huh.

Q If you believe that I killed Mr. Nelson because I thought Mr. Nelson was going to kill me or he came at me with a knife and I got my gun first and shot him, you see, then [2012] you don't give me a lower sentence because you thought I acted in self-defense. You find me not guilty just like I would have to find you not guilty if that were the situation and I were on the jury. Am I making myself clear?

A I suppose, but let me go back and say this: I'm not saying that I feel like I could impose the sentence myself—or I'm not going to be imposing the sentence; is that correct?

A Uh-huh.

A I'm trying to figure out why you've explained all that to me. I understood that, but what I'm saying is, it's not the jury's—it's not my decision to say whether or not he gets the murder penalty or not because that's already been established. The fact is, is he guilty of the crime or not, is that not what the jury is—

Q Well, that's partially correct and then it's a little bit confusing because this is a fairly complex area of the law. Let's talk a little bit about that. You understand that in any criminal trial—you see, any criminal trial is conducted in two parts, [2013] whether it be capital murder or shoplifting. The first part deals only with whether or not guilty. In other words, if the State has accused somebody of capital murder or if the State accuses somebody of shoplifting, the State has the burden of proof in all cases. We have to convince you that the person is guilty of capital murder or shoplifting, whatever the case may be. That's the only decision the jury makes.

Let's say if you find him not guilty, obviously the trial is over. find the person guilty of capital murder, we go on to the second phase of the trial where the penalty id determined. There is nothing automatic about somebody being the death penalty just because they are convicted of capital murder. It's not automatic. There's an option there based on the answers to questions.

Now, years ago, up until about thirteen years ago, jurors, after they convicted someone of capital murder, would listen to whatever evidence may be presented in the second phase of the trial—although there [2014] is no obligation for either side to present any more. You may have to make a decision just on what you learned about the offense itself. After the jurors heard the evidence in the first part or the trial, heard all of the evidence, they would go back and actually decide penalty or should they get a life sentence or should they get a number of years. It's like in the movies. You know, you've

seen those movies where the jury comes back and they say, well, we think he ought to hang for that or he ought to get the electric chair, whatever it was, and they actually voted for that. If all of them agreed it should be death, they all gave death.

Let me ask you, do you feel you're the type of person who could make that kind of decision directly?

A I've never been in that situation. I don't feel like I would want to be in that situation and whether I could do it or not, I'm not real sure.

Q Well, that's the reason why we spend the length of time with you now because, [2015] you know, rely—everyone here has to rely on your service as a juror on that you tell us now. There will be times when I talk to you, Ms. Boggess, where you're—you're going to answer questions probably in the same way I would and everyone else here would if we were in your shoes. I think so. Maybe. I don't know. You understand how important your answers are to everybody here. I don't want to make it sound like I'm putting any pressure on you, but the law does require that we kingpin you sown on some things, simply because the law requires it.

A I understand.

Q You see, if you say I think so, that means you may or you may not. Neither side can make a decision here and neither can the Judge on an answer like that, even though it's very human for you to answer that way. Do you see what I'm getting at?

A Yes.

Q One of the reasons I mention that is, in question fifty-eight it say here, "Do you have any moral, religious, or personal beliefs that would prevent you from returning a [2016] verdict which would ultimately result in the execution of another human being?" and you said, yes or you circles yes here. Could you talk a little bit about that?

A Well, I guess what I meant by that is, I do have difficulty—I've never been in a situation like this before, like I said. I believe that the bible states—and I am a Christian and I believe that the bible states that, if someone commits a crime or commits a sin or whatever you want to call it, there is a punishment and it is up to the people that love that person, the Christians or whatever, to punish that person for that particular crime because God will punish him and I believe he puts us down here to do that same thing. That's what I meant, but now whether or not I could actually go through with murder—with killing another person or taking another person's life, I just don't know. I'd have trouble with that.

Q Okay. You're not the first person to have voiced that opinion. That's why this is as tedious as it is and takes as long as it does because actually nobody wishes to put you [2017] or anybody else, Ms. Boggess, on a jury or in a position to have to do something—let's say to follow their oath as a juror, if they accept that oath—that is going to violate their conscience or their personal feelings that they've held for a long time if that's the situation. Do you see what I'm getting at?

We're not trying to make somebody do something against their conscience. It's just that simple. Sure the law does expect you, as a citizen of this community, to serve on a jury if you can. The law does not expect you, me, these other lawyers or anybody else to serve on a jury or do anything in violation of. their conscience.

Now, there is a big difference, as we all know, between a decision that may be difficult because certainly on a death penalty case, it would be difficult for anybody, I suppose. I'm sure it's not going to be an easy decision for anybody. For some people and, in fact, a lot of people, it's more than just a difficult decision. It's a decision that would cause them, because of the enormity or the magnitude of the situation, you

know, being a [2018] part of someone else being executed, they simply feel that would be a violation of their long—standing personal feelings and conscientious beliefs. Do you see what I'm getting at?

A Yes.

Q That's why the Judge told you that the oath the jurors take is an option. You have the opportunity, you or me or anybody, or the option of taking the oath or not taking the oath. It really is—I like the way the Judge put it. Be said it was kind of like a job or a job description. When you go and you interview for a job, you find out what all is involved because you want to know what is going to be expected of you once you sign on. Obviously, you're not under any obligation to sign on ordinarily for a new job until—you know, you want to know what it entails and what it involves and what you're expected to do and then whether or not you can do it or you want to do it. Do you see?

Now, that is kind of like this situation. If you're on this jury, for example or anybody is on a jury, you know that the [2019] result of three yes answers to these questions, if the State proves to you or anybody that these three questions should be answered yes, this Judge, I guarantee you, will sentence this Defendant to die. The Judge has no option. I know that the Judge is not going to get mad at me when I say this, Ms. Boggess. Be has really little to do with the decision as to life or death. In fact, he has virtually nothing to do except to carry out the will of the jury on the basis of those three answers. You see, three yes answers equals death. Although you don't write death in there like you used to, you might as well. Yes, yes, yes, equals death because the Judge can't change the verdict. Do you see what I'm getting at? If a person is on a jury that last yes equals death. DO you see what I'm getting at?

Now, that's part of the job description and ultimately it boils down to whether or not you feel like you could serve on

this jury and participate in the execution of another human being, that it was something that would both your personal conscience or your personal beliefs. If it doesn't, then you [2020] would probably be qualified to serve. If it does, then there is no requirement that you take the oath. Do you see what I'm getting at?

A Yes.

Q Now, let me back up for just a second. Maybe this might be helpful to us in discussing this. I hate to do this because it puts people in categories and I know it's hard to do sometimes and probably unfair, but it serves a purpose, I think.

When it comes to death penalty juries and capital punishment, people may be divided into four categories. In no particular order. I'm sure you know, before I go any farther, that rather a person serves on this type of a jury or a person doesn't serve, that doesn't make you a good citizen or a bad citizen because, if it were that way, then we would have about thirty—nine people that were bad citizens. We have only two jurors. We've talked to forty people. Do you see what I'm getting at?

A Yes.

Q You understand that. You don't get any points for serving on this kind of a [2021] jury or any demerits if you don't.

The first category of individual let's say is a person who believes in the death penalty, they believe it is a deterrent to crime or it's necessary for whatever reasons and furthermore, if they had to, they could serve on this jury and they could render a decision that would result in Mr. Miller-El's death. It wouldn't violate their conscience.

The second group says, well, I believe in it and I think we probably need it or it serves some purpose, but because of my personal beliefs or my conscientious beliefs, my religious or

my moral beliefs, I'm just not suited to serve on this kind of a jury. I could serve on a noncapital case, a burglary or a robbery or a murder that didn't involve the death penalty, but I'm just not suited for this type of a case.

Let's say there is a third category that say, I don't believe in it, the death penalty, but if it's the law, I guess my feelings aren't that strong and I guess I could serve on it.

Or a fourth category that says, I [2022] don't believe in the death penalty and my feelings are so strong that I could never return a verdict that would result in anyone being executed. No way.

Now, I know these are general categories, but do you see yourself falling into one of those four?

A Yes.

Q Which one is that?

A I probably would pick the first one.

Q You do believe in the death penalty?

A Yes.

Q And you say you could serve on the jury?

A Yes.

Q Even though it meant that it might be a tough decision?

A Yes.

Q Even though it meant that, if you answered all three of those questions yes based on the evidence, you know it would result in the execution of this Defendant?

A Yes.

[2023] Q So whatever personal feelings, religious or moral, that you have, you would not have to compromise them; you could serve on the jury and go ahead and answer those questions?

A Yes.

Q Is there any doubt in your mind about that at all?

A I could always tell the truth.

Q That's all you're expected to do. We have to come forth with the evidence to satisfy you beyond a reasonable doubt and, if we do, you answer the questions yes. If we don't, you answer the questions no. You know that the result of one or more no answers is a life sentence and those are the three questions that the Judge talked about yesterday that decide life or death.

Now, let me just cover one thing with you. You understand that in the old days, under the old law, the jurors decided on a personal basis. If you heard a fact situation, you heard about a defendant and a crime that made you mad enough, I guess, or caused you to feel that way, you would actually vote for [2024] death or life, if you didn't feel that way, or some number of years. Do you see what I'm getting at? It's a very personal decision.

We know that being on a jury, even though you don't make that decision directly, instead you answer the questions, you know that the result is the same, don't you? It could be death or life depending upon the answers?

A Yes.

Q The law expects you to put aside your feelings, your personal feelings, one way or the other and not let them influence your decision. Am I making myself clear?

A Uh-huh.

Q We all know, however, that we're obviously not robots. If I were on a jury, I might have a personal feeling. I might say, well, after I heard the evidence, or you might say, I think this guy ought to die for what he did. I'm not talking about Mr. Miller-El. Let's just talk about an example. You know, you might say, for what he did, I think this guy ought to be boiled in oil, if it were up to me. In any case, I think he ought to die, but when it comes time to answering these three [2025] questions, let's say you look at them in all honesty and find out that we have not satisfied you that one or more of the questions should be answered yes. In which case, you know,

your oath as a juror would require you to answer the question no. Could you do that, go ahead and answer the question no knowing that it would result in a life sentence and not the death sentence that you personally desire? Do you see what I'm getting at?

A Yeah. I could answer the questions on the basis of the truth, the facts that I felt like were the truth.

Q You see, the flip side of that coin, don't you?

A Yes.

Q Let's say you're on a jury and you say, well, this may be capital murder, but I don't think the guy—you know, if I could vote directly, I don't think the guy should die?

A Yes.

Q But I look at those questions and, yeah, they proved to me that he did it deliberately. Yeah, that's true. I can answer [2026] that yes. I think he probably would commit some criminal act of violence, so I can answer that one yes. And three, I believe it was unprovoked. Do you see what I'm getting at? Three yes answers in that situation would equal death. Could you put aside your personal feelings for a life sentence and answer those three questions yes knowing that it would result in the execution of that Defendant which would be contrary to your personal desire?

A I still back and say, regardless of my feelings, I would hope that I would not judge him by how I felt personally, that I would judge him by what facts I heard.

Q That's what the law would expect. Let's shift gears here for just a second and let's talk about a situation that I'm not saying would ever come up, but we have to discuss it at this time. You know capital murder, the type of capital murder that we've alleged in this indictment, as the Judge referred to it and as we call it also, it's murder plus. We have the murder, the knowing or intentional killing of another human being, but no legal excuse or justification. It's [2027]

couple with another very serious offense, another felony offense, murder during a robbery, for example, as alleged here. Okay. That's one type of capital murder.

I gather from what you told us, because that's what the law is, that's the type of capital murder you believe the death penalty could be called for depending on the facts and circumstances?

A Right.

Q The other type is murder during a burglary, murder during a rape, murder during arson or murder during a kidnapping, murder plus. Do you understand that murder itself is not a capital offense. But when you commit murder during a robbery, then it goes up to capital murder. Do you see what I'm getting at?

A Yes.

Q Now, let's say that you're on a jury. Just imagine for a second that you're on a capital murder jury. The State has alleged murder during a burglary, a capital murder, we proved the murder. There's no doubt about it. You don't have any doubt that the Defendant [2029] killed somebody with no legal excuse and no justification for it under the law at all. It was knowing and intentional, but you didn't hear any testimony about a burglary. Do you understand, if that were the situation, if that situation occurred, you could not convict that individual of capital murder for the very simple and obvious reason that we didn't prove capital murder. What did we prove?

A Just regular murder.

Q You got it. That's right. When you find him not guilty of capital murder because we didn't prove that and find him guilty of what we did prove, which was what? You said murder. Well, if that were to happen, you forget all about the automatic life or death, you see. Those are no longer options for regular murder. The range of penalty for murder is very, very broad under the laws of the State of Texas.

I want to go back to what we were talking about earlier. That is where we're talking about the murder offense. You talk about the range of penalty for murder, not capital murder, but regular murder, then you [2029] must exclude from your thinking a homicide, in other words a killing, where one person kills another person knowingly or intentionally, you must exclude what I said earlier, self—defense. When you think about murder and the range of penalty, high or low or somewhere in between, you must exclude self—defense because, as I said earlier, if you believe someone killed somebody in self—defense, they've got a right to do that. You have to find someone like that no guilty.

What I'm saying is, I don't want you to be thinking, well, I can give X number of years lower because someone killed in self—defense. If you think someone killed knowingly or intentionally in self—defense, you have to find them not guilty. The same thing would hold true if you thought it was an accident. That's not a lower penalty. That's not guilty. I mean, if the gun went off accidentally, you don't give someone a lower sentence. You find them not guilty.

If you believed someone was insane at the time that they knowingly or intentionally killed somebody, well, that's not [2030] murder either. You find them not guilty. Am I making myself clear?

A Yes.

Q Or if you found, for example, that somebody killed someone in the heat of sudden passion. For example, somebody comes home and finds out that their child had been sexually molested by a neighbor. The neighbor is up the street and he is laughing about it. The father flies off the handle, goes into a rage, picks up his gun, goes up the street and kills the neighbor. Well, the law doesn't excuse that, but it doesn't call it murder, either. It's less than murder. It's called

voluntary manslaughter, so don't be thinking about that. That's not within the range of penalty. Am I making myself clear?

A Yeah.

Q Now, having set that stage—and I'm just asking you for your personal opinion, all right? If you believe one person knew he was going to kill somebody, intended to kill somebody and did it, no insanity, no accident, no self—defense and no heat of passion, what do you think the minimum ought to be, Ms. Boggess, [2031] for that sort of an offense, for that kind of murder, a knowing and intentional murder?

A I don't have any problem with what I think. It's what I believe and I believe that the bible says that person should be put to death. That's in Romans and that's my belief. Whether I want to be the one to decide that is—

Q In other words, in your personal feelings it should be death for knowing and intentional murder; is that correct?

A Right.

Q Let me ask you, ma'am, in that regard, knowing that the range of penalty is from five years to ninety-nine years or life for murder—that's what the law sets out—could you ever—would you ever feel it was proper—could you ever hear any facts or circumstances where you personally would feel it would be proper to assess a sentence as low as five years for a knowing and intentional murder—

MR. CUNNINGHAM: Your Honor, she—go ahead.

Q I think I'm finished.

[2032] MR. CUNNINGHAM: Your Honor, we would object to the form of the question because it fails to include if she heard the facts and circumstances of that case and she believed that the facts and circumstances called for five years.

THE COURT: Go ahead and ask the question.

MR. CUNNINGHAM: And, Your Honor, I think she should be told what the range of punishment is.

MR. MACALUSO: I think I just did, Your Honor. If I'm not mistaken I did say it was five years to ninety—nine years or life, didn't I?

Q That's what the law says, that the range of penalty for murder is five years to ninety-nine years or life. The law expects a juror, if he can. to tailor the punishment somewhere in between there. Let me just as you, do you personally feel—you know, that's why you're here. We're asking you.

A Let me explain something.

Q Sure.

A You know, my feelings about the law and my feelings about what the bible says about what the law does. I feel that, you know, the bible says that I should be under the government, the rule of the government. However, it says also to me that the rule of the government should be a biblical rule and if the rules of government are not biblical, then I'm not supposed to follow that, but follow my own beliefs biblically. I'm having difficulty with the fact that what the law decides is not biblical principle, but yet I'm still under the law. Not that I'm going to break the law, but I don't want to be a part of that particular—I don't want to go with the law just because it's the law, just because you say he should get five to ninety-nine or he should get death, because of this or the other, when the bible says, no, that's not the way I want it. Do you understand what I'm saying?

Q I think I understand what you're saying. You said personally you would vote for death. You think a person ought to receive the [2034] death penalty for that; is that correct?

A I'm saying that my personal beliefs, because I'm a Christian, says that, if someone commits a murder, then that's what the bible says. Whether or not the law says it, you know, is something different because—you've decided what you're

going to do. You know what I'm saying? The law has decided, now I'm supposed to follow the law, but only if the law states what is biblically right.

Q That's why we're going through and asking you all these questions. I'm out of time right now. The Judge has very graciously allotted us a specific amount of time, but I just want to ask you this last question. It's kind of a difficult question to ask.

Knowing yourself and knowing how you feel in your heart and in your mind and spiritually, for that matter, do you feel, ma'am, that there would ever be any facts and circumstances where you feel it would ever be proper or justified, that you could ever under any facts and circumstances, feel that a five year sentence, you could ever consider and actually vote for a sentence as low as five [2035] years, for the knowing and intentional taking of another human life without any legal excuse or any legal justification whatsoever? Do you ever feel it would be proper under any circumstances to vote for that sort of a low sentence?

A That's tough. I may—

Q You know, we have to pin you down on that. I know you haven't heard any facts. We can only go as far as we have. You've just got to search your heart and your mind. Just tell us how you feel. Do you feel you could ever—you would ever feel it proper under any facts and circumstances where you would be able to vote for as low as five years in the Texas Department of Corrections where one person knowingly and intentionally killed somebody, commits murder, without any legal excuse or any legal justification whatsoever regardless of the facts?

A I'd have to say yeah. I'd have to say that I may do that. It just depends on where my heart was and bow my faith—and what I had prayed about and how God had answered my prayers. You know, even though He says death

[2036] sentence for everything, the Lord does do different things at different times. He doesn't always kill everybody just because someone else kills them, so I couldn't say that.

Q Again, I regret this, but I'm going to have to pin you down at this point. It's either yes, you feel you could or you could not.

A I feel I could.

Q Do you have any questions at all of me, Ms. Boggess?

A No.

Q Do you know of any reason, whether we've touched on it or not, why you could not be a fair and impartial juror in this case?

A I don't think I could ever not be fair or impartial. I don't think I could ever not be fair and impartial, but I wouldn't want to serve on it, though, but that's my true feeling.

Q You've been very polite, ma'am, and very kind to us and very attentive and I appreciate it.

MR. MACALUSO: Your Honor, [2037] I'll pass the prospective juror.

THE COURT: Thank you, Mr. Macaluso. You have five extra minutes if you need it.

[2038 EXAMINATION

BY MR. CUNNINGHAM:

Q How do you pronounce your last name, please?

A Boggess,

Q Ms. Boggess, my name is Cunningham and to my immediate left is Mr. West. As Mr. Macaluso indicated to you, we have been appointed to represent Mr. Miller-El in this case. Just briefly I would like to ask you a few questions because I think you have answered their questions and based upon the law, you're qualified as a juror in this case.

On your information sheet for religious preference or your church, OCB, is that El or F?

A F, Oak Cliff Bible Fellowship.
Q Where is that located?
A It's on Camp Wisdom in Dallas.
Q I've been trying to figure in my mind where your husband works in the district clerk's office. Is his hair sort of salt and peppered?
A Yes. He is crippled.
Q Oh, he works in the back. I've [2039] known him a long time. This is for the purpose of the record. What is your race?
A Black.
Q She's taking down everything you say and unless we •ask you, it's not in the record. Do you teach Sunday school?
A Yes.
Q You're a member of the Visiting Nurses Association?
A Right. I'm a therapist.
Q Do you know Etta Bernice Johnson?
A Uh-huh.
Q How long have you known Etta?
A I don't know her personally. I just know her name.
Q She is also a member of your association?
A Yes.
Q You live at 5717 Fox Hill Lane?
A Right.
Q How long have you and your husband and children lived there?
A Almost eight years.
Q Are you and your husband buying your home there?
[2040] A Yes.
Q Two of them attend public school?
A Yes.
Q Is it public or private?
A Public.

Q Where does Ke'Andra go to school?
A Atwell Junior High.
Q And your son goes to school where?
A Turner. All three of those are boys.
Q Have you taken any other courses above your BS degree?
A No.
Q You don't remember what security agency your husband used to work for?
A I think it was Preston or something like that. I don't know if they're still in business.
Q What did he do for them?
A He rode the Surtran buses and monitored the bus drivers.
Q You've never had any criminal jury service?
A No.
Q How many times have you been [2041] called down?
A I don't know. I've only served once.
Q At least one time you served on a civil and while—or you took a recess and they settled it?
A Yes.
Q Ms. Boggess, you understand that in a criminal case, the State of Texas has the burden of proof in a case. That's these gentlemen over here?
A Uh-huh.
Q If you were chosen as a juror in this case would you hold them to their burden of proof?
A I beg your pardon?
Q The burden of proof is on the State to prove its case beyond a reasonable doubt. The law says that, if they do not prove their case beyond a reasonable doubt, the jury should find the accused not guilty. My question to you is, if they failed to prove their case beyond a reasonable doubt, would you have any problem with finding the accused not guilty?
[2042] A No, not if they didn't prove it.

Q In other words, if they don't prove it, not guilty. If they prove it, guilty. That's what the law expects and you could do that?

A Yes.

Q I'm not confusing you, am I?

A No.

MR. CUNNINGHAM: Pass the juror, Your Honor.

MR. MACALUSO: The State will exercise a preemptory challenge, Your Honor.

THE COURT: Okay. Ms. Boggess, you'll be excused from service in this case. We appreciate your attention down here today and your patience with us and tell Joe hello for me, would you? He's been a witness up here a few times. Have a good day.

(Whereupon, Ms. Boggess left the courtroom, after which the following proceedings [2043] were held.)

THE COURT: Go ahead, Mr. Nelson.

MR. NELSON: The State would like to put in the record at this time the following reasons for exercising our preemptory strike for Ms. Boggess: Number one, she stated that she wasn't sure she could actually give death and, as a matter of fact, because of the big decision in this case, she did not want to serve on this jury. It is my understanding that the Court is also placing the questionnaires in the Court's records. I would like to call the attention of the Court to where Ms. Boggess said she was a defense witness for her nephew who was evidently charged with stealing at one time. It is for those reasons that we chose to exercise our preemptory strike on this juror.

MR. CUNNINGHAM: Ordinarily, [2044] Your Honor, I probably would not say anything, but since the State is putting into the record that alleged reason for striking Ms. Boggess, I would point out to the Court that of the five blacks

that have qualified all five have been struck, by the State, those being; Roger R. Bozeman, number seven; Billy J. Fields, number nine; filbert Gitchaway, number seventeen; Virginia R. Smith, number nineteen; Joe A. Warren, number twenty-eight and now Ms. Carrol Boggess, who they just struck.

THE COURT: She was number forty?

MR. CUNNINGHAM: Number forty. Joe A. Warren is number twenty-eight.

THE COURT: Let me tell you what my records show.

MR. CUNNINGHAM: Did I say Virginia Smith—Bozeman, Fields, [2045] Gitchaway—no. Gitchaway was by agreement. I'm sorry.

Bozeman, Fields, Warren, Rand and Boggess.

THE COURT: Let me make sure that the record is clear. I show that Mr. Bozeman—

MR. CUNNINGHAM: Was their first strike.

THE COURT: I think that's probably correct. We've had several blacks either excused by agreement or for cause. Let me clarify something because I do remember now that we agreed or it should be clear that we're going to put into the Court's file any questionnaires of any the State's strikes because I can go back and get them in there. I don't know if I've got all of them in there right now or not.

REPORTER: I have them.

THE COURT: Mr. Cunningham, to make sure that the record is in [2046] the shape that you—all want it for any reason, will you make sure at some point after voir dire that Ms. Bardwell has the questionnaires of all the jurors that you want in there? I'm sticking some in the file as we go, but I prefer to let the court reporter keep track of that, if you—all wouldn't mind.

Let's bring in the next juror.

(Whereupon, these proceedings are continued in Volume V.)

* * * *

[2050] SHEILA WHITE,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. NELSON:

Q Good morning, Ms. White. I want to start out by reintroducing every one who you met at least briefly yesterday. My name is Jim Nelson. The man seated next to me is Mr. Paul Macaluso. Another man who will be involved in this trial once we start putting on evidence is a gentleman by the name of Norman Kinne. Mr. Kinne, who is about fifty years old or so, has been suffering from the chicken pox and we've been giving him a little bit of trouble about that. When the trial starts, he will be presenting the evidence and taking, what we call, the lead in the case. The three of us, Mr. Macaluso, Mr. Kinne and myself are assistant district attorneys. We've been assigned by Henry Wade to handle this case for the State of Texas.

Seated immediately to my left is

* * * *

[2053] that's all we ask of you.

Now, I feel like you have a right to know at this point, Ms. White, what the position of the State of Texas and our office is in this case. We are actively seeking the death penalty in this case for that man right down there, Thomas Joe Miller-El. We feel like we will be able to present to twelve persons on a jury the type and quantity of evidence for them

to, first of all, convict him of capital murder and then in the punishment phase, enough evidence for them to answer those three questions there yes. If each of those questions are answered yes by the jury, that results as a matter of law in the death penalty. At that point Judge McDowell has no option whatsoever. If those three questions are answered yes, then Judge McDowell must—is required to assess the death penalty in this case. If one of those questions is answered no, then Judge McDowell is required to assess a life sentence. There is no option. He has no discretion in this matter at all. It's up to the jury and it's the jury's decision.

That's where we are and that's [2054] what we're planning to do. Each that—you filled out a questionnaire yesterday and I know you didn't have a whole lot of time to think about it and all this was kind of sprung on you. Most people come down here expecting to be on a civil case or a shoplifting case or something like that and you wind up on a capital murder case. There was one question on here about the death penalty and now that you've had time to think about it a little bit more and, I guess, sleep on it, I'm going to ask you, if you would, to just tell us in your own words how you feel about the death penalty and whether you feel it serves a purpose in our society or not?

A I don't disagree with the law, that there is a death penalty, but for my own self, I cannot in all consciousness, you know, say that someone is guilty and, yes, they should be executed,

Q Okay. Let me—you're the forty—first person we've talked to in one way or another in trying to select this jury. We have two jurors at this point. You can see from that that we've got one in twenty so far that

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